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No. 93-

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1993

FOXMEYER DRUG COMPANY,

Petitioner,

v.

COOPERS & LYBRAND,

Respondent.

In re FOXMEYER DRUG COMPANY,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
and in the alternative
PETITION FOR COMMON-LAW WRIT OF CERTIORARI,
AND FOR WRIT OF MANDAMUS
TO HONORABLE DONALD E. ZIEGLER,
UNITED STATES DISTRICT JUDGE
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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59 pp

Questions Presented

1. Does a civil action between nondiverse and nonbankrupt parties which involves only state-law claims "arise under" federal law within the meaning of Article III, § 2 of the United States Constitution, and "relate to" a pending bankruptcy within the meaning of 28 U.S.C. § 1334(b), simply because the action could, depending on a number of contingencies, have some hypothetical and indirect effect on administration of the bankruptcy estate?

2. Under 28 U.S.C. § 1334(c)(2), does a district court's mandatory obligation to abstain in a state-law action, "commenced" in a state court, and that "relates to" a pending bankruptcy, not apply simply because the action had been removed to federal court and thus was not "pending" in state court when abstention was requested?

3. Does 28 U.S.C. § 1334(c)(2), which precludes certain specified avenues of appellate review of a mandatory abstention decision, also preclude other, unspecified avenues of appellate review, such as mandamus pursuant to 28 U.S.C. § 1651, when a district court's decision refusing to abstain is based upon statutorily impermissible considerations?

List of Parties, Affiliated Corporations, and Interested Persons

The undersigned hereby certifies that, to the best of his knowledge, the following are "interested parties" with respect to the subject matter of this petition, and related entities under Rule 29.1, *i.e.*, all parent companies and subsidiaries.

District judge:

Honorable Donald E. Ziegler
United States District Judge
Western District of Pennsylvania

Parties:

FoxMeyer Drug Company

Related entities:

National Intergroup, Inc.

Coopers & Lybrand

The following persons, partners in Coopers & Lybrand, may be deemed also to be "interested" in the subject matter of the petition, by virtue of an order signed July 23, 1993, in *In re Phar-Mor, Inc. Securities Litigation*, MDL No. 959 in the United States District Court for the Western District of Pennsylvania, that all pleadings of record in the multidistrict litigation be "deemed amended to assert claims against the individual partners and/or principals of Coopers & Lybrand," and treating the following as "adequate class representatives of the current partners and/or principals of Coopers & Lybrand":

Eugene M. Freedman
William K. O'Brien
Larry S. Schumer

John Henry Cynkar
Robert Scott Williams
Richard L. Baird
John E. Easton
Philip H. Reed, Jr.
Vincent M. O'Reilly
John J. Roberts
Steven L. Skalak
Robert T. Caruso
Bjorn Hanson
William F. Buettner, Jr.
Gregory S. Finerty
Richard E. Sherman

The following persons, believed to be partners in Coopers & Lybrand, filed responses to complaints in all cases in *In re Phar-Mor, Inc. Securities Litigation,* after the entry of the above-mentioned order of July 23, 1993:

Thomas J. Colligan
Warren D. Jones
Theodore G. Glyptis
John H. Holzapfel
James R. Lattanzi
Garret L. Stauffer
Louis L. Testoni
Howard K. Von Schaven
James H. Weber

The following additional persons or entities may be considered "interested" by virtue of having been named in this action by Coopers & Lybrand and others at various times (and, in some instances, from time to time dropped) as third-party defendants after removal of petitioner's state-court suit:

Phar-Mor, Inc.
David S. Shapira
Patrick B. Finn
Jeffrey C. Walley
A. Joel Arnold
Westinghouse Credit Corporation
First Westinghouse Capital Corporation
Corporate Partners, L.P.
Corporate Offshore Partners, L.P.
State Board of Administration of Florida
Lester Pollack
Jonathan H. Kagan
Nathan H. Monus
Giant Eagle, Inc.
Giant Eagle of Delaware, Inc.

This action is now pending in the *Phar-Mor, Inc., Securities Litigation* proceeding, and has been consolidated for discovery purposes with 35 other actions now pending in that proceeding. Other than the various persons and entities identified above in this certificate, the parties to other actions pending in the MDL proceeding are not parties to or interested in this action.

MARVIN S. SLOMAN

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue pursuant to 28 U.S.C. § 1254(1) to review the order and decision of the United States Court of Appeals for the Third Circuit, filed March 25, 1994. In the alternative petitioner prays that a common-law writ of certiorari issue pursuant to 28 U.S.C. § 1651(a) to review the order and decision of Honorable Donald E. Ziegler, United States District Judge for the Western District of Pennsylvania,

signed November 5, 1993, and that upon final hearing a writ of mandamus issue to the district judge.

OPINIONS BELOW

The decision of the court of appeals is unreported and is reproduced in Appendix 1. The decision of the district court is also unreported and is reproduced in Appendix 2.

JURISDICTION

The court of appeals entered its judgment on March 25, 1994. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1), and alternatively under 28 U.S.C. § 1651(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of Article III, § 2, cl. 1 of the United States Constitution and the text of 28 U.S.C. § 1334(b) and (c) are reproduced in Appendix 3.

STATEMENT OF THE CASE

Petitioner, FoxMeyer Drug Company ("FoxMeyer"), commenced this case in state district court of Dallas County, Texas, against respondent Coopers & Lybrand ("Coopers") seeking over $72 million in damages. (App. 4 Item 1)[1] FoxMeyer had invested money and extended credit to a client of Coopers, PharMor, Inc. ("Phar-Mor"), in reliance on representations by Coopers

[1]Record citations throughout are to filed papers in the courts below, numbered and identified by their full names in Appendix 4. Thus the record citation "App. 4 Item 1" refers to item numbered 1 on the list appearing in Appendix 4.

that it had audited the financial statements of Phar-Mor in accordance with generally accepted auditing standards, the financial statements were prepared in accordance with generally accepted accounting principles, and the financial statements fairly represented Phar-Mor's financial condition. These representations were false. Phar-Mor filed for bankruptcy protection in 1992 without having repaid FoxMeyer.

FoxMeyer's suit against Coopers alleged only state-law claims for negligent misrepresentation and professional negligence. Coopers was the only defendant, and FoxMeyer and Coopers are both considered to be citizens of Texas for purposes of diversity jurisdiction.[2] FoxMeyer also filed a claim as an unsecured creditor in the Phar-Mor bankruptcy, but Phar-Mor was not named a defendant in FoxMeyer's action against Coopers.[3](App. 4 Item 1)

Despite the absence of diversity jurisdiction under 28 U.S.C. § 1332 or of federal question jurisdiction under 28

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[2]FoxMeyer is a Kansas corporation with its principal office in Carrollton, Dallas County, Texas. (App. 4 Item 1) Coopers is a national accounting partnership licensed to practice accountancy in Texas with a business address and partners in Dallas, Texas. (App. 4 Item 7) *See* 28 U.S.C. § 1332(c) (as to FoxMeyer) and *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990) (as to Coopers).

[3]Coopers has at various times in this proceeding filed pleadings purporting to name Phar-Mor as a third-party defendant. Coopers's most recent third-party pleading, however, does not name Phar-Mor. No responsive pleading of Phar-Mor appears of record. It thus appears that Phar-Mor remains unconnected to this action.

In any event Coopers's third-party complaints would have no impact on the issue of the district court's subject-matter jurisdiction of FoxMeyer's action against Coopers. *Louisville & N.R.R. v. Mottley*, 211 U.S. 149 (1908) (federal jurisdiction must depend on the state of circumstances when the jurisdiction is invoked).

U.S.C. § 1331, Coopers removed the action to federal court. (App. 4 Item 2) The only basis for federal jurisdiction asserted by Coopers was 28 U.S.C. § 1334(b); Coopers claimed that the case "related to" the Phar-Mor bankruptcy pending in Ohio. Having removed the case to a federal district court in Texas, Coopers then moved that the case be transferred, but not to the federal district in Ohio where the supposedly "related" Phar-Mor bankruptcy was pending. (App. 4 Item 3) Instead, Coopers sought to transfer the case to the United States District Court for the Western District of Pennsylvania as a "tag-along" to other suits pending in *In re Phar-Mor, Inc., Securities Litigation,* MDL Docket No. 959. After the case was removed to federal court, FoxMeyer responded by filing a timely motion to remand, and in the alternative to abstain. (App. 4 Item 3) FoxMeyer urged that federal courts could not exercise "related to" jurisdiction over the case, and that in any event, the district court was required to abstain from exercising jurisdiction pursuant to the mandatory abstention provisions of 28 U.S.C. § 1334(c)(2).

The Judicial Panel on Multidistrict Litigation ultimately granted Coopers's transfer request, and transferred FoxMeyer's suit against Coopers to the MDL where it was consolidated for discovery with the other suits pending in the Phar-Mor securities litigation. (App. 4 Item 8) Once the case was transferred, the United States District Court for the Western District of Pennsylvania denied FoxMeyer's motion to remand or abstain. (App. 2 at 3) The district court concluded that the case might affect the Phar-Mor bankruptcy, if FoxMeyer prevailed on its claim against Coopers, by possibly removing FoxMeyer from the Phar-Mor creditor pool. The court concluded that such a contingent effect was sufficient for the case to "relate to" the Phar-Mor bankruptcy within the meaning

of 28 U.S.C. § 1334(b). (App. 2 at 3-7) With respect to FoxMeyer's alternative request for abstention, the district court noted that mandatory abstention was only required under § 1334(c)(2) when a case is "commenced" in state court. Although FoxMeyer's case against Coopers was commenced in state court, the district court concluded that abstention was not required because the case was not "pending" in state court when FoxMeyer requested abstention. (App. 2 at 7-9)

Because the district court's order was neither an immediately appealable final decision under 28 U.S.C. § 1291 nor an appealable interlocutory order under 28 U.S.C. § 1292(a)(1), FoxMeyer moved the district court to certify the order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (App. 4 Item 9) The district court denied FoxMeyer's motion. (App. 4 Item 10) Having no other adequate remedy, FoxMeyer filed a petition for writ of mandamus pursuant to 28 U.S.C. § 1651(a) with the United States Court of Appeals for the Third Circuit. (App. 4 Item 11) On March 25, 1994 the court of appeals denied the petition without written opinion. (App. 1)

FoxMeyer now petitions this Court for relief.

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

This case presents issues of fundamental importance concerning the scope of federal judicial authority under Article III, § 2 of the United States Constitution. FoxMeyer properly filed the case in state court, alleged only state-law claims, and sued a nondiverse and nonbankrupt party. Despite the absence of any federal interest in the action, the district court nonetheless exercised federal subject-matter jurisdiction based on the entirely hypothetical possibility that the case could ultimately affect the administration of the pending Phar-Mor bankruptcy. The district court concluded that the case "related to" the Phar-Mor bankruptcy proceedings within the meaning of 28 U.S.C. § 1334(b), even though Phar-Mor was not a party to FoxMeyer's case against Coopers, even though the case does not seek to adjudicate claims by or against the bankruptcy estate, and even though the case could only affect the estate if several contingencies were to occur.

For the case to affect the Phar-Mor bankruptcy, FoxMeyer must prevail against Coopers; FoxMeyer must recover on any judgment against Coopers; the debtor, Phar-Mor, must be entitled under state law to a reduction in liability to FoxMeyer based on any recovery FoxMeyer might obtain from Coopers; sufficient funds must be available in the Phar-Mor bankruptcy to pay claims of unsecured creditors such as FoxMeyer; and the amount of any distribution to FoxMeyer must actually be reduced because of FoxMeyer's recovery from Coopers. Indeed, given these many contingencies, the district court acknowledged that this case "may not" have any effect on the Phar-Mor bankruptcy but nonetheless concluded that any possibility that the case would implicate federal

interests in administration of the bankruptcy estate was sufficient to confer federal jurisdiction.

Such an exercise of federal jurisdiction based on an entirely hypothetical possibility that the case might affect administration of a bankruptcy estate, if permitted, would dramatically expand the scope of federal authority over cases traditionally the province of state courts. Federal jurisdiction would be limited only by the creativity of the party seeking to invoke federal authority in conceiving of some nexus to a pending bankruptcy. The Court has never considered the restraint on federal "related to" bankruptcy jurisdiction imposed by the requirement in Article III, § 2 of the United States Constitution that an action "arise under" federal law. But the Constitution must require more than the conjuring of a hypothetical scenario to support federal jurisdiction. Indeed, the district court's expansive reading of federal judicial authority is fundamentally inconsistent with settled doctrine that contingent federal interests are insufficient for the exercise of federal jurisdiction. The district court's decision is also inconsistent with Congress's expressed intent in enacting § 1334(b). The district court's insistence on exercising jurisdiction, despite the exclusively local character of the dispute, presents an important question justifying issuance of the writ.

Having decided to assume jurisdiction, the district court then refused to comply with a mandatory obligation to abstain under 28 U.S.C. § 1334(c)(2). This obligation was intended by Congress to broadly apply whenever a party sought abstention with respect to exclusively state-law claims that could be timely adjudicated in state court. This broad obligation to abstain was believed necessary to prevent unconstitutionally broad exercises of "related to" bankruptcy jurisdiction. The district court, however, nar-

rowly construed mandatory abstention under § 1334(c)(2) as inapplicable to cases that had been removed to federal court. Relying on the requirement in § 1334(c)(2) that an action be "commenced ... in a state forum of appropriate jurisdiction," the court refused to abstain because this case was not "pending" in state court, even though the case was "commenced" in state court before it was improperly removed to federal court. The district court's construction of its obligation to abstain is clearly contrary to the plain meaning of the statute. Moreover, by first construing "related to" bankruptcy jurisdiction so broadly as to violate Article III, § 2 of the Constitution, and then narrowly construing mandatory abstention as not applying to removed cases, the district court has turned the Congressional policy favoring state-court resolution of entirely local disputes on its head. Preserving this important policy necessitates issuance of the writ.

As a consequence of the district court's refusal to remand or abstain, FoxMeyer is trapped in a federal forum it did not choose, there to pursue state-law claims against a nondiverse party over which the judicial authority of the United States does not extend. Absent review by mandamus, no adequate remedy is available to review the district court's order. Under 28 U.S.C § 1334(c)(2), that portion of the order refusing to abstain can only be reviewed by extraordinary writ, either in the court of appeals or in this Court. That portion of the order refusing to remand for lack of subject-matter jurisdiction is not immediately appealable. Requiring FoxMeyer to await a final judgment would force it to incur astronomical costs in a remote federal MDL proceeding, as well as impose an unnecessary burden on federal judicial resources. Given this extraordinary expense, the important federalism concerns implicated by the district court's order, and

the need to restore the important policy favoring state court resolution of local disputes, mandamus is necessary.

ARGUMENT

I. The District Court's Decision to Exercise Jurisdiction in this Case Despite the Entirely Contingent Nature of Any Federal Interest Raises An Important Question Concerning the Constitutionally Permissible Scope of "Related To" Bankruptcy Jurisdiction Under 28 U.S.C. § 1334(b).

Federal court jurisdiction over cases "related to" bankruptcy proceedings cannot constitutionally extend so far as to encompass cases involving purely state-law claims between nonbankrupt and nondiverse parties. The district court nonetheless concluded that it had jurisdiction in this case because of the mere possibility that the outcome could affect the Phar-Mor bankruptcy. Explaining its conclusion, the district court hypothesized that "a judgment in favor of FoxMeyer in this action could conceivably effect [sic] the bankruptcy proceedings. The fact that, in the end, it may not have an effect is irrelevant to our jurisdictional analysis." (App. 2 at 6 n.1)

The district court thus recognized that any effect on the Phar-Mor bankruptcy would be contingent on FoxMeyer prevailing in the case. In addition, even were FoxMeyer to prevail, for the case to affect the Phar-Mor bankruptcy FoxMeyer must recover on any judgment against Coopers; the debtor, Phar-Mor, must be entitled under state law to a reduction in liability to FoxMeyer based on any recovery FoxMeyer might obtain from Coopers; sufficient funds must be available in the Phar-Mor bankruptcy to pay claims of unsecured creditors such as FoxMeyer; and the amount of any distribution to FoxMeyer must

actually be reduced because of FoxMeyer's recovery from Coopers. Any judgment in favor of FoxMeyer would not, therefore, necessarily reduce or even affect FoxMeyer's allowed claim in the Phar-Mor bankruptcy.

The hypothetical possibility that FoxMeyer's action might have some future effect on the Phar-Mor bankruptcy is manifestly insufficient to establish subject matter jurisdiction under Article III of the United States Constitution. Article III, § 2 grants jurisdiction to the federal courts over cases and controversies "arising under" the Constitution or laws of the United States. The mere existence of some remote or contingent federal interest in an action is insufficient to confer "arising under" jurisdiction. *Gully v. First Nat'l Bank,* 299 U.S. 109 (1936). In *Gully,* the Court held there was no federal jurisdiction over a suit to collect state taxes from a national bank, even though the power to levy a tax upon a national bank had its origin in federal law. The Court rejected a broad abstract definition of "arising under," suggesting instead a practical, common sense application:

> If we follow the ascent far enough countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.

Id. at 118 (Cardozo, J.). For federal question jurisdiction to exist the federal interest must be directly implicated by the plaintiff's claim. It is not enough that a federal

interest is implicated remotely or indirectly. *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 482 (1957) (Frankfurter, J., dissenting) (rejecting any principle that would permit "assertion of original federal jurisdiction on the remote possibility of presentation of a federal question").

Congress may not extend the jurisdiction of the federal courts over actions "related to" bankruptcy proceedings beyond the limits established by Article III, § 2 of the Constitution. *Kline v. Burke Constr. Co.,* 260 U.S. 226, 234 (1922) The legislative history of 28 U.S.C. § 1334(b) reflects a strong belief that applying "related to" bankruptcy jurisdiction over state-law claims, if based solely on the bankrupt status of a party to the litigation, would raise grave constitutional concerns. During debates over § 1334(b) Senator Hatch observed, for example, that

> State tort or contract cases in which one party happens to be bankrupt are still State law claims. They are not Federal questions. Thus, there is no Federal jurisdiction for these claims. The Constitution only grants Federal court jurisdiction to cases "arising under" Federal law and diversity cases. This is neither.
>
> * * *
>
> Article III, section 2 of the Constitution specifies the types of cases that may be litigated in Federal courts. Other than cases involving a State as a party, these types of cases are basically two — cases "arising under" Federal law and cases "between citizens of different States." Cases based solely on State law cannot be adjudicated in any Federal court where there is no diversity and where the only Federal connection is that one of the parties is a chapter 11 debtor.

> In the absence of the bankruptcy of one party, no one questions that a State tort or contract claim would be adjudicated to completion in State court without any feasible assertion of Federal question jurisdiction. Financial status, however, is not mentioned as a qualification for Federal question jurisdiction in article III. Thus, the provision allowing any case "related to" bankruptcy to be adjudicated in Federal court violates article III. Purely State law claims cannot be adjudicated in a Federal court.

130 CONG. REC. S8891 (daily ed. June 29, 1984).[4] *See also* Note, *Bankruptcy and the Limits of Federal Jurisdiction,* 95 HARV. L. REV. 703, 710-11 (1982). It was unquestioned that applying "related to" jurisdiction in cases, like the present case, involving only state-law claims between nondiverse and nonbankrupt parties would violate Article III, § 2. As Senator Hatch pointedly remarked, "In the absence of the bankruptcy of one party, no one questions that a State tort or contract claim would be adjudicated to completion in State court without any feasible assertion of Federal question jurisdiction." 130 CONG. REC. S8891.

Nonetheless, numerous lower courts, including the district court in this case, have expansively construed "related to" jurisdiction to require only some "conceivable" nexus between a state action and a pending bankruptcy.

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[4] Senator Hatch's statement is a principal component of the limited legislative history of the Bankruptcy Amendments and Federal Judgeship Act of 1984. There is no committee report accompanying the Act. Rather, the legislative history consists entirely of several statements made by senators and representatives in the last few days prior to the Act's enactment. *See* Jeffrey T. Ferriell, *Constitutionality of the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 63 AM. BANKR. L.J. 109, 110 n.4 (1989).

Applying this conceptually limitless standard, federal courts have found actions based exclusively on state law alleging fraudulent misrepresentation, breach of contract, and conversion, for example, to somehow "arise under" federal law. *In re Wood*, 825 F.2d 90, 93-94 (5th Cir. 1987) (suit to recover stock and monies allegedly misappropriated by the debtor); *In re Dogpatch U.S.A, Inc.*, 810 F.2d 782 (8th Cir. 1987) (suit for alleged breach of contract of sale of debtor's property; if plaintiff prevailed, debtor would remain liable for mortgage on property); *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1994, 1210-13 (3d Cir. 1991) (debtor's counterclaim and third-party claim asserted in suit against debtor for conversion and unjust enrichment). To illustrate the unconstitutionally boundless nature of the "any conceivable nexus" concept, one commentator has suggested that an action as traditionally local in character as a state court proceeding to modify a decree awarding alimony to a debtor would "arise under" federal law were this standard correct. Note, *Selective Exercise of Jurisdiction in Bankruptcy-Related Civil Proceedings*, 59 TEX. L. REV. 325, 331 n. 43 (1981).

Even under the boundless "conceivable nexus" concept, however, courts had previously refrained from exercising jurisdiction unless the debtor was a party to the action, the bankruptcy court had *in rem* jurisdiction, or resolution of the action would have an automatic and binding detrimental effect upon the bankruptcy estate. *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984) (no "related to" jurisdiction over products liability action simply because of contingent indemnification claim of defendant against the debtor); *In re Alpha Steel Co.*, 142 B.R. 465 (M.D. Ala. 1992) (no jurisdiction over suit by debtor's general contractor against lender for misrepresentation which induced general contractor to disburse

portion of contract funds to debtor); *In re Selig*, 135 B.R. 241 (Bankr. E.D. Pa. 1992) (no jurisdiction over dispute between creditors over property sold by debtor 18 months before bankruptcy; substitution of creditors insufficient effect for "related to" jurisdiction).

Notwithstanding these decisions, the district court in the instant case has substantially extended the already expansive definition of "related to" jurisdiction by exercising authority over a state court action between nondiverse and nonbankrupt parties where the only "conceivable" federal interest is admittedly entirely hypothetical. Under this unrestrained extension of "related to" jurisdiction, any limit that remains on federal jurisdiction becomes itself purely hypothetical. Suppose, for example, that a manufacturer of good sells its product to a retailer. Shortly after the sale, the seller learns that the buyer is insolvent. The seller makes written demand for reclamation of the goods, but before the seller can recover the goods the buyer declares bankruptcy. Fortunately for the seller, there is a solvent co-debtor to sue, and at this point the seller would prefer to recover the price of the goods rather than the goods themselves. If the seller would also prefer to sue in federal court, the seller could bring a state-law action against the nonbankrupt co-debtor in federal court because it "relates to" the buyer's bankruptcy — or at least this would be the result were the district court's construction of "related to" jurisdiction in this case correct.[5] Yet clearly, were such an entirely local dispute a case "arising under" federal law, the restrictions on judicial power declared in Article III, § 2 would have vanished altogether.

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[5]For similar examples, see Note, *Selective Exercise of Jurisdiction in Bankruptcy-Related Civil Proceedings*, 59 TEX.L.REV. 325, 330-31 (1981).

The ever expanding assumption of "related to" jurisdiction has been largely driven by a desire to expedite bankruptcy proceedings by avoiding delays in case administration caused by litigation outside the bankruptcy system. *See generally American Enterprise Institute for Public Policy Research, Bankruptcy Reform* 7-11 (1978). To the extent the federal judicial system becomes congested with bankruptcy-related civil cases, however, a broad jurisdictional construction may itself exacerbate the existing delay and expense of crowded dockets. In fact, precisely because of federal docket congestion, FoxMeyer was able to establish in the district court that its claims against Coopers would be resolved more expeditiously in Texas state court than in the federal MDL proceedings. (App. 4 Items 6A, 6B)

Moreover, the broad interpretation of "related to" jurisdiction in this particular case does nothing to allow the bankruptcy court to control the litigation, given that the case has been transferred to the MDL litigation in Pennsylvania rather than to the federal district in Ohio where the Phar-Mor bankruptcy is pending. Finally, and most importantly, even if a federal interest in efficient administration of bankruptcy proceedings might somehow be served by broadly construing "related to" jurisdiction as extending to this action, the Court has held that "the value of efficiency in the disposition of lawsuits" does not justify ignoring the limitations on federal jurisdiction contained in Article III. *Aldinger v. Howard,* 427 U.S. 1, 15 (1976) (quoting *Kenrose Mfg. Co. v. Fred Whitaker Co.,* 512 F.2d 890, 894 (4th Cir. 1972)).

To avoid overstepping the bounds of Article III, "related to" bankruptcy jurisdiction must be informed by constitutional principles defining the outer reaches of the federal judicial power. Although the Court has never

considered the Article III, § 2 restraints on "related to" bankruptcy jurisdiction,[6] the Constitution requires more than the mere conjuring of a hypothetical scenario to support federal court jurisdiction. To provide the basis for federal jurisdiction, the "effect" on a bankruptcy administration must be direct and substantial, not collateral and remote. *Gully v. First Nat'l Bank,* 299 U.S. 109, 113-118 (1936). Here, any hypothetical effect would be entirely indirect and remote. Absent the chapter 11 filing by Phar-Mor, which is not a party to this dispute, FoxMeyer would unquestionably be entitled to adjudicate its claims against Coopers in Texas state court. The action involves purely state-law claims and is between nondiverse parties. The district court's insistence on exercising federal jurisdiction in these circumstances, despite the exclusively local character of the dispute, presents an important question justifying issuance of the writ.

II. The District Court's Refusal to Apply the Mandatory Abstention Provision in 28 U.S.C. § 1334(c) to an Action Removed from State Court Undermines a Significant Restraint on the Exercise of Federal Bankruptcy Jurisdiction.

Even assuming the federal court did have jurisdiction over these purely state-law claims between non-diverse parties, Congress has mandated in 28 U.S.C. § 1334(c)(2) that the court abstain from hearing such cases, upon a timely motion and the satisfaction of specified criteria. FoxMeyer met these requirements in the district court. The district court, however, construed the

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[6]The Court's decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982) focused on Article III, § 1, and required that judges exercising Article III power possess the attributes of the federal judiciary outlined in § 1.

statute as not applying to cases removed from state court, and for that reason refused to abstain even though FoxMeyer satisfied the statutory criteria. In so doing, the court exceeded the bounds of its authority as prescribed by Congress.

28 U.S.C. § 1334(c)(2) imposes a mandatory obligation to abstain in cases "related to" bankruptcy upon timely motion where three requirements are satisfied: (1) the action must be one that "could not have been commenced in a court of the United States absent jurisdiction under this section"; (2) the action could be "timely adjudicated" in the state forum; and (3) "the action is commenced . . . in a state forum of appropriate jurisdiction." FoxMeyer timely moved to abstain; plainly the action could not have been commenced in federal court absent the Phar-Mor bankruptcy; and FoxMeyer established in the district court that the action could be timely adjudicated in the state court where it was properly commenced (App. 4 Items 6A, 6B). The requirements of § 1334(c)(2) were thus met, but the district court denied FoxMeyer's motion to abstain based upon a mistaken construction of the statutory requirement that a district court abstain only if "an action is commenced . . . in a state forum of appropriate jurisdiction." In the district court's view, "an action is commenced" within the meaning of the statute only if the action is pending in state court when the motion to abstain is filed. (App. 2 at 8, 9) The district court concluded, based upon this erroneous interpretation of the statute, that mandatory abstention under § 1334(c)(2) "does not apply to removal [sic] cases where there is no corresponding state law action . . . . " (App. 2 at 8) The district court's ruling is contrary to the plain meaning of § 1334(c)(2), and wholly frustrates the Congressional policy that led to enactment of the statute.

The district court's construction of § 1334(c)(2) is directly contrary to the language of the statute. "Commence" is defined by Webster's as " . . . To enter upon; to begin; initiate; to perform the first act of; as to *commence* a lawsuit," WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1960) (emphasis in original). This case was "commenced . . . in a state forum of appropriate jurisdiction" because FoxMeyer began the case by filing it in state court. Because Coopers subsequently removed the case to federal court, the case was not "pending" in state court when FoxMeyer filed its motion to abstain. But § 1334(c)(2) simply does not require that an action be "pending" in state court for mandatory abstention to apply.

Not only is the district court's construction of § 1334(c)(2) contrary to the plain meaning of the statute, it is also inconsistent with the statute's legislative history. That legislative history reveals that Congress intended for mandatory abstention to be broadly construed, largely to prevent unconstitutionally broad exercises of "related to" bankruptcy jurisdiction. The mandatory abstention language in § 1334(c)(2) first appeared in the Bankruptcy Amendments and Federal Judgeship Act of 1984. Remarking on the bill, Senator Heflin stated:

> Section 1334(c)(2) mandates the Court on the motion of a party to abstain from determining matters that could not have been commenced in Federal court without the filing of a petition in bankruptcy and is based upon a State claim or cause of action.
>
> * * *
>
> The fundamental question at the heart of this debate on the restructure of our bankruptcy courts is: Does the Congress of the United

> States want to authorize a super court bankruptcy system, with greater authority than the civil jurisdiction of the U.S. District court, that is able to supersede any State court in this country? I cannot believe that is what the Senate of the United States wants to create — I certainly am for continuing our great system of federalism in this country and not for the creation of an all powerful Federal bankruptcy system.

130 CONG. REC. S17152 (June 19, 1984). The Report of the Committee on the Judiciary of the United States Senate accompanying the Senate version of the bill amplifies Senator Heflin's remarks:

> [T]he 1978 Act went too far in providing for Federal jurisdiction over claims based purely on state law which are only tangentially related to a case under title 11. While one obvious approach to addressing this concern is to remove Federal jurisdiction over such claims, the Committee chose to preserve the thrust of 1978 Act [sic] and to simply provide a mechanism for the parties to litigate these claims in state court should one of the parties so move.

S. REP. NO. 98-55, 98th Cong., 1st Sess. 1, 18 (1983). According to the Senate Report, mandatory abstention was a compromise solution adopted in lieu of following the sentiments of some members of the Judiciary Committee that *all* state-law proceedings should be returned to state court. The Committee felt § 1334(c)(2) drew an equitable balance between the legitimate interests of federalism and the important interests promoted by the 1978 Bankruptcy Act in consolidating as much jurisdiction as possible in a single decision-making body. *Id.* at 40-41.

One will search in vain in the Congressional Record for the proposition that Congress did not intend § 1334(c)(2) to apply to removed cases. Indeed, even the legislators who opposed a broad mandatory abstention provision concurred that abstention should be required if a non-debtor party objected to the federal court hearing a state-law dispute. 130 CONG. REC. S6098 (daily ed. May 21, 1984) (remarks of Senator DeConcini). *See also* 130 *Cong. Rec.* S17153, S17155 (June 19, 1984). Thus, the legislators interpreted § 1334(c)(2) as requiring abstention even when the debtor itself is the party plaintiff.[7] Given this legislative history evidencing an intent that § 1334(c)(2) be broadly construed, as well as the plain language of the statute, the majority of federal courts to consider the issue have held that mandatory abstention under § 1334(c)(2) does apply to cases that have been removed from state court.[8]

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[7]The district court, without citation to legislative history, cited as one ground for refusing to abstain, that:

> [I]t is unlikely that Congress would, on the one hand, grant jurisdiction over bankruptcy-related cases to federal courts, while, on the other hand, prohibit those courts from exercising jurisdiction. Such an interpretation implies that Congress is engaged in futile statutory exercises rather than enacting meaningful law, and we reject that view.

(App. 2 at 8)

[8]*See In re Bowen Corp.*, 150 B.R. 777, 783 (Bankr. D. Idaho 1993); *Dunkirk Ltd. Part. v. TJX Cos.*, 139 B.R. 643, 645 (Bankr. N.D. Ohio 1992) (citing *dicta* in *Robinson v. Michigan Consol. Gas Co.*, 918 F.2d 579 (6th Cir. 1990); *Channel Bell Assocs. v. W.R. Grace & Co.*, 1992 WL 232085 at *8 (S.D.N.Y. August 31, 1992); *In re Baldwin Park Inn Assocs.*, 144 B.R. 475, 481 (C.D. Cal. 1992); *Baxter Healthcare Corp. v. Hemex Liquid. Trust*, 132 B.R. 863, 869 n.7 (N.D. Ill. 1991); *Indian River Homes, Inc. v. Young, Conaway, Stargatt & Taylor*, 1991 WL 171267 at *2 (D. Del. 1991); *O'Rourke*

Nonetheless, a minority of federal courts, including the district court in this case, have reached a contrary conclusion.[9] These latter courts have concluded that § 1334(c)(2) necessarily requires the existence of a pending state court proceeding because "[i]ndeed if there were only one proceeding, and the court abstained with respect to it, nothing would go forward." *In re 666 Assoc.*, 57 B.R. 8 (Bankr. S.D.N.Y. 1985), *rev'd sub nom. Paul v. Chemical Bank*, No. 85 Civ. 1978 (ULB), slip op. (S.D.N.Y. Dec. 22, 1978).

This reasoning reflects a miscomprehension of the concept of abstention. The absence of a "pending" state court action does not prevent a federal court from abstaining. For example, federal courts commonly abstain from exercising jurisdiction over pendent state-law claims after the federal law claims have been dismissed, even in the absence of a pending state court proceeding. *Car-*

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v. Cairns, 129 B.R. 87, 89-90 (E.D. La. 1991); *In re Jasperson*, 116 B.R. 740, 742 & 746 (Bankr. S.D. Cal. 1990); *In re Marshall*, 118 B.R. 954, 964-65 (W.D. Mich. 1990); *In re Revco D.S., Inc.*, 99 B.R. 768, 773 (N.D. Ohio 1989); *In re Chiodo*, 88 B.R. 780, 785 (W.D. Tex. 1988); *In re World Solar Corp.*, 81 B.R. 603, 609 (Bankr. S.D. Cal. 1988); *National Acceptance Co. v. Levin*, 75 B.R. 457, 459-60 (D. Ariz. 1987); *In re Pacor, Inc.*, 72 B.R. 927, 931 (Bankr. E.D. Pa. 1987), *aff'd*, 86 B.R. 808 (E.D. Pa. 1987), *appeal dism'd*, 1988 WL 235479 (3d Cir. 1988); *Allen County Bank & Trust Co. v. Valvmatic Int'l Corp.*, 51 B.R. 578, 583 (N.D. Ind. 1985).

[9] *See Neuman v. Goldberg*, 159 B.R. 681, 687-88 (S.D.N.Y. 1993); *In re Branded Products, Inc.*, 154 B.R. 936, 939-40 (Bankr. W.D. Tex. 1993); *Weisman v. Southeast Hotel Properties, Ltd.*, No. 91 Civ. 6232, 1992 WL 131080, at *5 (S.D.N.Y. June 1, 1992); *In re Fairchild Aircraft Corp.*, 1990 WL 119650 at *2 (Bankr. W.D. Tex. June 18, 1990); *In re Micro Mart, Inc.*, 72 B.R. 63, 64-65 (Bankr. N.D. Ga. 1987); *In re Ross*, 64 B.R. 829, 834-35 (Bankr. S.D.N.Y. 1986).

negie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988). Upon making a decision to abstain, the court has the option to stay the proceeding awaiting the resolution of any pending state-court proceeding, to dismiss, or to remand the case to state court. *In re Chiodo*, 88 B.R. 780, 784 (W.D. Tex. 1988) (citing *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941)).

The strained and narrow construction of the statute adopted by the district court here so circumscribes the application of § 1334(c)(2) so as to render it virtually meaningless. That construction would limit the application of mandatory abstention to: (1) proceedings initiated only in federal court; (2) but only if a parallel state-court action was also brought; (3) and only if such parallel state court action was not itself removed. It is difficult to conjure the circumstances that would give rise to such an unusual procedural posture. Unquestionably, Congress did not intend § 1334(c)(2) to be interpreted so as to strip it of virtually any meaning whatsoever. The proper construction of mandatory abstention under § 1334(c)(2), and the relationship between mandatory abstention and "related to" bankruptcy jurisdiction under § 1334(b), present important questions justifying issuance of the writ.

III. Mandamus Review of the District Court's Order is Appropriate and Necessary.

A. Mandamus is Appropriate and Necessary Given the District Court's Constitutionally Impermissible Exercise of Federal Authority and the Absence of Any Adequate Alternative Remedy.

A traditional office of mandamus has been to confine lower courts to their prescribed jurisdiction. The Court has consistently held that mandamus is appropriate "to confine inferior courts to the exercise of their prescribed jurisdiction or to compel them to exercise their authority when it is their duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). *Accord, Hoffman v. Blaski*, 363 U.S. 335 (1960); *United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 203-204 (1945). The district court's decision that it has jurisdiction because the present case "relates to" the Phar-Mor bankruptcy proceeding, and its related decision refusing to abstain, exhibit a failure to recognize the constitutional limits on federal authority required by Article III, § 2.

Absent review by mandamus, no adequate remedy is available to review the district court's order. The order is plainly not an appealable final decision under 28 U.S.C. § 1291, and the district court refused to certify an interlocutory appeal under 28 U.S.C. § 1292(b). Nor is the order an appealable collateral order. *Cf. Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). The only alternative means for appellate review of the order, therefore, is after final judgment years from now, after FoxMeyer has incurred astronomical expense litigating its claim against Coopers in the MDL, and after the federal trial and appellate courts have been needlessly burdened with the litigation.

The hardship to FoxMeyer if mandamus is not granted in this case far exceeds the ordinary hardship that results to a litigant when a dispositive interlocutory motion is wrongfully denied. FoxMeyer's ability to litigate its claims in the MDL has already been severely prejudiced by the gargantuan and cumbersome nature of that proceeding. To date 36 cases are consolidated in the MDL involving some 182 different parties with appearances by some 56 separate law firms. The presence of so many parties makes the discovery process extremely burdensome, and necessitates the creation of committees, subcommittees, and liaison counsel to which particular issues and tasks are delegated. (App. 4 Items 12-15) The process of litigating petitioners' state-law claims in the MDL is intensely time-consuming, and as a result, quite expensive, especially when compared with the relatively inexpensive state court properly selected by FoxMeyer. Awaiting relief until after a final judgment would require FoxMeyer to incur the extraordinary expense and delay of litigating its state-court claims in a remote, complex federal MDL proceeding, then enduring lengthy and expensive federal appellate proceedings, and then relitigating the claims in Texas state court. Such belated relief, exacted at such an incredible cost to FoxMeyer, is simply not adequate. *See, e.g., In re School Asbestos Litig.*, 977 F.2d 764, 778 n. 14 (3d Cir. 1992) ("the extraordinary size and complexity of a case" is not alone a sufficient basis for mandamus, but it "may assist in creating the extraordinary circumstances necessary to invoke mandamus. . . .").

The extraordinary expense and delay that would result from awaiting final judgment coupled with the important federalism concerns implicated by the district court's order in this case themselves suffice to render mandamus

an appropriate remedy. An additional factor, however, makes this case a compelling one for the exercise of mandamus. Here the district court's order undermines the important Congressional policy that "related to" bankruptcy jurisdiction not be exercised to reach cases traditionally and properly within the exclusive province of state courts. That concern is evident in the legislative history to 28 U.S.C. § 1334(b), and motivated the mandatory abstention provision in 28 U.S.C. § 1334(c)(2). By expansively interpreting "related to" jurisdiction, but then restrictively interpreting mandatory abstention, the district court has egregiously undermined the Congressional policy favoring state court resolution of local disputes. The need to restore this important Congressional policy clearly justifies mandamus. *United States Alkali Exp. Ass'n v. United States*, 325 U.S. 196, 203-204 (1945).

B. Mandamus Review of the District Court's Decision Refusing to Abstain is Appropriate Despite the Language in 28 U.S.C. § 1334(c) Precluding Certain Appellate Review of Mandatory Abstention Orders.

Although 28 U.S.C. § 1334(c) forbids certain appellate review of district court abstention decisions, the statute does not preclude review by mandamus. Section 1334(c) provides that a district court's abstention decision "is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of [28 U.S.C.] or by the Supreme Court of the United States under section 1254 of [28 U.S.C.]." FoxMeyer did not, however, invoke the court of appeals's jurisdiction to review final decisions pursuant to § 1291, to review various interlocutory orders and certified appeals pursuant to § 1292, or to hear bankruptcy appeals under § 158(d). Nor does it seek §1254 certiorari here with respect to

abstention, except as the Court may deem it procedurally appropriate to direct the court of appeals to issue mandamus. FoxMeyer instead requested mandamus in the court of appeals, and invokes the Court's authority to issue mandamus and common-law certiorari, pursuant to the All Writs Act, 28 U.S.C. § 1651(a).

The very language of § 1334(c), therefore, does not preclude issuance of a writ of mandamus. Had Congress intended to preclude all review of trial court abstention decisions, it would have used more generally preclusive language. For example, 28 U.S.C. § 1447(d) provides, in contrast to § 1334(c), that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal *or otherwise*" (emphasis supplied). Significantly, § 1447(d) does not limit its nonreviewability provision by reference to certain specific avenues of review, as does § 1334(c).

Moreover, even when a statute such as § 1447(d) generally prohibits appellate review, a trial court's decision is unreviewable only to the extent the trial court relies upon proper statutory considerations in reaching its decision. When the lower court acts for reasons not authorized by statute, review of the court's decision by mandamus is essential to ensure that legislative restraints on the court's authority are honored. *Thermtron Prod., Inc. v. Hermsdorfer*, 423 U.S. 336 (1976).

In *Thermtron,* the district court remanded a properly removed case because the court's heavy docket would "unjustly delay" plaintiffs in obtaining a trial on the merits. This Court concluded that mandamus review of the trial court's remand order was appropriate, despite the pervasive prohibition in § 1447(d). The Court concluded that § 1447(d) precluded review based on improper applications of statutory remand criteria, but did not preclude

review where the trial court acted for reasons not authorized by statute. The Court reasoned as follows:

> [W]e are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute. That justice may move more slowly in some federal courts than in their state counterparts is not one of the considerations that Congress has permitted the district courts to recognize in passing on remand issues.

423 U.S. at 351. Because the district court acted upon an improper consideration, rather than simply improperly applying a proper consideration, review by mandamus was appropriate.

As in *Thermtron*, the district court in the present case acted outside its statutory authority. Rather than base its decision of the motion to abstain on permissible considerations specified in § 1334(c), the court improperly refused mandatory abstention based upon its legally incorrect conclusion that abstention was not authorized because the case was no longer pending in state court. In so doing, the district court undermined an essential statutory restraint on the exercise of federal authority over state matters. Indeed, Congress concluded that the mandatory abstention provision in § 1334(c) was necessary to confine trial courts within the scope of their Article III authority. As in *Thermtron*, Congress could not have intended that district courts have carte blanche authority to define the scope of this restraint on their own authority. Review by mandamus is not only permissible in this case; mandamus is essential.

CONCLUSION

For the foregoing reasons a writ of certiorari pursuant to 28 U.S.C. § 1254(1) should issue to the United States Court of Appeals for the Third Circuit.

In the alternative, a common-law writ of certiorari should issue pursuant to 28 U.S.C. § 1651(a) to the United States District Court for the Western District of Pennsylvania, and on final hearing the Court should issue its writ of mandamus to Honorable Donald E. Ziegler, United States District Judge, requiring the district judge to remand this case to the Texas state court in which it was commenced, or in the alternative to abstain from hearing the case and to remand the case for plenary adjudication by the Texas court in which it was commenced.

Respectfully submitted,

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June 14, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3071 February 23, 1994
A-95

IN RE: Phar-Mor, Inc., Securities Litigation
W.D. of Pa. Civil 92-1938
MDL No. 959
Master File No. Misc. 93-96
W.D. of Pa. Civil 93-933, 93-1226 and 93-1797
FoxMeyer Drug Co., *et al., Petitioners*

Present: BECKER, NYGAARD and ROTH,
Circuit Judges.
Petition for Writ of Mandamus,

/s/ RITA GOLDEN
Deputy Clerk 597-3080

ORDER

The foregoing petition is denied.

By the Court,

/s/ EDWARD R. BECKER
Circuit Judge

Dated: March 25, 1994

RG/CC: CM
GGR
MSS
DJA

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE: PHAR-MOR, INC. SECURITIES LITIGATION FOXMEYER DRUG COMPANY, *Plaintiff,* v. COOPERS & LYBRAND, *Defendant.*	CIVIL ACTION 92-1938 MDL NO. 959 MASTER FILE NO. MISC. 93-96 THIS OPINION APPLIES TO CIVIL ACTION NO. 93-0933

MEMORANDUM OPINION

ZIEGLER, District Judge

Pending before this court is a motion to remand or, in the alternative, to abstain and remand filed by plaintiff, FoxMeyer Drug Company. FoxMeyer contends that this court lacks subject matter jurisdiction over this action, and that, even if subject matter jurisdiction is present, we are required to abstain and remand to the Texas state court where the action was initially brought.

This action began in the 193rd Judicial District Court, Dallas County, Texas, with the filing of an original petition by FoxMeyer on February 15, 1993. FoxMeyer's Motion and Brief to Remand or in the Alternative Ab-

stain and Remand ("FoxMeyer Brief"), p. 1. The petition alleges that defendant, Coopers & Lybrand ("Coopers"), a public accounting firm, "knowingly, recklessly, or negligently failed to audit the financial statements of Phar-Mor, Inc. ("Phar-Mor"), a large retail discount drugstore chain, in accordance with generally accepted auditing standards. Petition, ¶ 13. FoxMeyer contends that as a result of the allegedly faulty audits, Coopers misrepresented to FoxMeyer that the financial statements accurately reflected the financial position of Phar-Mor. *Id.* FoxMeyer claims that it relied on these financial statements and the representations of Coopers, to its detriment, in deciding to extend credit to Phar-Mor. *Id.*, ¶ 17.

On or about August 4, 1992, Phar-Mor publicly disclosed that its financial statements had been falsified to conceal substantial losses and to overstate income. Coopers' Memorandum In Opposition ("Coopers Memo."), p. 5. Shortly thereafter, Phar-Mor filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the United States District Court for the Northern District of Ohio. *Id. See In re Phar-Mor, Inc., et al.*, Case Nos. 92-41599 to 41614. FoxMeyer has filed a claim against the bankrupt estate in the bankruptcy proceedings. *Id.*, p. 8.

On March 8, 1993, Coopers filed a Notice of Removal with the United States District Court for the Northern District of Texas. The stated statutory basis for removal is 28 U.S.C. § 1452(a), which provides that a party may remove an action to the district court if the action "is related to" a title 11 bankruptcy proceeding. Notice of Removal, ¶ 4.

On March 16, 1993, FoxMeyer filed the instant motion with the district court in Texas. Before that court had an opportunity to rule on the motion, the Judicial Panel on Multidistrict Litigation transferred the action to this court, as a "tag-along" case, where coordinated and consolidated proceedings are being held over numerous civil actions related to Phar-Mor's fraudulent financial statements and resultant bankruptcy. The Judicial Panel concluded that the instant case involved questions of fact which are common to the actions which had previously been transferred to this court. *See* Conditional Transfer Order of the Judicial Panel on Multidistrict Litigation.

FoxMeyer contends that we should remand for two reasons: first, this action is not "related to" the Phar-Mor bankruptcy litigation, thereby depriving this court of subject matter jurisdiction; and second, the abstention provision of 28 U.S.C. § 1334(c)(2) mandates abstention. In either event, FoxMeyer asserts that we should remand the case to the Texas state court in which its petition was originally filed. For the reasons discussed below, we will deny FoxMeyer's motion.

I. SUBJECT MATTER JURISDICTION

The instant action comes before us pursuant to the removal statute, 28 U.S.C. § 1452(a), which provides in relevant part that:

> A party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

Jurisdiction is granted to the federal district courts under section 1334(b) over "all civil proceedings arising under title 11, or arising or *related to* cases under title 11." (emphasis supplied).

The instant state law negligence action clearly does not arise under title 11 and Coopers does not allege as much. Instead, Coopers asserts that the action is related to the Phar-Mor bankruptcy litigation, and that we have jurisdiction on that basis. Notice of Removal, ¶ 4. We agree.

The Court of Appeals has stated that the test for determining whether a civil action is related to a bankruptcy proceeding so as to vest a district court with jurisdiction is whether the outcome of that action "could conceivably have an effect on the estate being administered in bankruptcy." *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). A civil action need not be filed against the debtor or the debtor's property to be deemed related. It is sufficient that the outcome of the action could result in the alteration of the debtor's "rights, liabilities, options or freedom of action (either positively or negatively)", and which could effect the "handling and administration of the bankrupt estate." *Id.*

In applying this test, we must be mindful of the purpose underlying this jurisdictional grant. As the Court of Appeals for the Fifth Circuit stated in *In re Wood*, 825 F.2d 90 (5th Cir. 1990), Congress intended that a "broad range of matters [be] subject to the bankruptcy jurisdiction of federal courts." *Id.*, at 92. In making this grant, Congress was seeking to eliminate or minimize

> the inefficiencies of piecemeal adjudication of matters affecting the administration of bankruptcies and intended to give federal courts the

> power to adjudicate all matters having an effect on the bankruptcy.

Id.

FoxMeyer and Coopers both cite to *Pacor* in support of their arguments. In *Pacor*, the plaintiffs initially brought an action in state court against Pacor, Inc. seeking damages for injuries allegedly caused by exposure to asbestos, which had been distributed by Pacor. Pacor filed a third party complaint against the manufacturer of the asbestos, Johns-Manville Corporation. Shortly thereafter, Johns-Manville filed for bankruptcy. Nearly six months later, as the state court was preparing for trial, Pacor filed a petition for removal in the Bankruptcy Court for the Eastern District of Pennsylvania on the basis of "related to" bankruptcy jurisdiction. *Pacor*, 743 F.2d at 986. The bankruptcy court recommended that the entire action be remanded to state court. The district court agreed that the action by the plaintiffs against Pacor was not related to the bankruptcy action and ordered that part of the case should be remanded. At the same time, the court severed the third party action and ruled that part of the lawsuit should remain in the bankruptcy court. The Court of Appeals affirmed.

In affirming the district court's decision to remand, the Court determined that the outcome of the action between the plaintiffs and Pacor would in "no way . . . determine any rights, liabilities, or course of action of the debtor." *Id.*, at 995. The Court found probative the fact that

> any judgment received by the [plaintiffs] could not itself result in even a contingent claim against Manville, since Pacor would still be obligated to bring an entirely separate proceeding to receive indemnification.

Id. Thus, the civil action was not related to the bankruptcy proceedings and the federal courts had no subject matter jurisdiction over the action.

Unlike the situation in *Pacor*, the outcome of the present controversy could have a direct effect on Phar-Mor's rights and liabilities. FoxMeyer is a claimant in the Phar-Mor bankruptcy proceeding, and in fact is the largest (or one of the largest) trade creditor(s) in the bankruptcy proceeding. The damages that it seeks to recoup in this action are the identical losses on which FoxMeyer bases its bankruptcy claim. Consequently, should FoxMeyer recover, its bankruptcy claims would be satisfied and FoxMeyer would effectively be removed from the creditor pool, thereby lessening Phar-Mor's liabilities and positively altering the rights of the remaining creditors. [1] Other courts have held that actions which may directly effect a plaintiff's claims against the debtor in the bankruptcy proceeding are related for purposes of jurisdiction under § 1334(b).[2] *See, Civic Center Cleaning*

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[1]The fact that a full recovery of losses by FoxMeyer here may result in a "mere transfer" of FoxMeyer's bankruptcy claim to Coopers fails to persuade us that this action is not related to the bankruptcy proceedings. We decline FoxMeyer's invitation to deny jurisdiction on the basis of speculative, post-action maneuverings of the parties. We are satisfied that a judgment in favor of FoxMeyer in this action could "conceivably" effect the bankruptcy proceedings. The fact that, in the end, it may not have an effect is irrelevant to our jurisdictional analysis.

[2]FoxMeyer's statement that a judgment in its favor against Coopers would not give rise to "automatic liability" on the part of Phar-Mor (FoxMeyer Reply Brief, p.3) fails to take into account the fact that "related to" jurisdiction does not require that the effect on the bankrupt estate be a *negative* one. See *Pacor,* at 994. A positive effect on the estate, resulting from the elimination of a creditor's claim, is sufficient for a finding of jurisdiction.

Co., Inc. v. Reginella Corporation, 140 B.R. 374 (W.D. Pa. 1992); *In re M. Paolella & Sons, Inc.*, 85 B.R. 965 (Bankr. E.D. Pa. 1988); *Howard Brown Co. v. Reliance Ins. Co.*, 66 B.R. 480 (E.D. Pa. 1986); *In re Showcase Natural Casing Co.*, 54 B.R. 142 (Bankr. S.D. Ohio 1985).[3]

We hold that the instant action satisfies the test of *Pacor* and is related to the Phar-Mor bankruptcy. We therefore hold that subject matter jurisdiction is present pursuant to 28 U.S.C. § 1334(b).

II. ABSTENTION

Our conclusion that we have jurisdiction does not end our inquiry into the propriety of adjudicating the instant action. FoxMeyer asserts that, even if we have jurisdiction over this matter, we are required to abstain due to the abstention provision set forth at 28 U.S.C. § 1334(c)(2). That section provides in part:

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

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[3]We also note that the proceedings in the state court in *Pacor* had been ongoing for nearly six months when the case was removed to federal court. Here, the action was removed shortly after service of the complaint on Coopers. Hence, the state court had not engaged in any significant activity over the action prior to its removal.

The claims in this negligence action are solely state law claims. There is neither a federal question nor diversity jurisdiction. As a result, absent § 1334's jurisdictional grant, we would lack jurisdiction over the matter.

We hold that the abstention provision does not apply to removal cases where there is no corresponding state law action, and that the statutory vehicles for removal and remand must be applied independently of the abstention provisions. *See, Neuman v. Goldberg*, __B.R.__, C.A. No. 93-2092, 1993 WL 403179 at *5 (S.D.N.Y. Sept. 30, 1993) ("the statutory scheme of § 1334 precludes the application of the mandatory abstention provision in § 1334(c)(2) to removed actions absent a parallel state case"); *In re Branded Products, Inc.*, 154 B.R. 936 (W.D. Tex. 1993); *In re Micro Mart, Inc.*, 72 B.R. 63 (Bankr. N.D.Ga. 1987), *In re AK Services, Inc. v. AK Engineering, Inc.*,__B.R.__, C.A. No. 93-14887, 1993 WL 385529 (Bankr. D. Mass. Sept. 24, 1993). Thus, we will not abstain.

We reach this conclusion for several reasons: first, it is unlikely that Congress would, on the one hand, grant jurisdiction over bankruptcy-related cases to federal courts, while, on the other hand, prohibit those courts from exercising jurisdiction. Such an interpretation implies that Congress is engaged in futile statutory exercises rather than enacting meaningful law, and we reject that view. Had Congress intended to effectively eliminate the district courts' ability to adjudicate state law claims related to bankruptcy proceedings, it is reasonable to assume that it would have taken the direct approach and simply excluded the "related to" clause from the jurisdictional grant in § 1334.

Moreover, we agree with the courts which have found significant the fact that Congress did not expressly amend § 1452(b) (the remand statute) to limit the district court's discretion over remand. *See, Weisman v. Southeast Hotel Properties Ltd. Partnership*, No. 91 Civ. 6232, 1992 WL 131080 at *5 (S.D.N.Y. June 1, 1992); *General American Corp. v. Merrill Lynch Commodities*, Inc., 64 B.R. 829 (Bankr. S.D.N.Y. 1986). Under that provision, a district court may remand to state court any removed claim or cause of action "on any equitable ground". In the absence of an express limitation on a district court's discretionary authority, we hold that the abstention provision does not apply to the remand statute, and Congress intended that the remand decision remain solely a discretionary function of the district courts.

Finally, our conclusion that the abstention provision of § 1334(c)(2) is not applicable to this action is buttressed by the fact that there is no pending state law action, and therefore, no threat of inconsistent judgments or friction between state and federal courts. It is also important that the negligence claims do not appear to raise any novel state law issues which would be better adjudicated in a state forum. As a result, issues of comity and preference for state court interpretation of its own laws, the central factors that the abstention provision was designed to address, are not implicated. *Ram Construction Company, Inc. v. Port Authority of Allegheny County*, 49 B.R. 363 (W.D. Pa. 1985) (refusing to abstain where case did not present unsettled questions of state law or comity issues).

For the above reasons, we hold that the mandatory abstention provisions of 28 U.S.C. § 1334(c)(2) are inapplicable to the circumstances of this action and do not require that we abstain.

III. REMAND — EQUITABLE CONSIDERATIONS

We also conclude that equitable considerations militate against remanding this action to state court. As we stated above, we are empowered by statute to remand to the state court any claim or cause of action if the equities so warrant.

Various equitable factors have been considered by the courts in deciding whether to remand an action to state court. These factors include: (1) the court's duty to decide matters properly before it; (2) the plaintiff's right to choose the forum; (3) the nature of the claim; (4) the unsettled nature of the state law issues such that state law would be better addressed by the state courts; (5) the prejudice to the involuntarily removed parties; (6) comity considerations; (7) economical versus duplicative use of judicial resources; (8) the effect on efficient administration of bankruptcy estates; (9) the possibility of inconsistent results; (10) the right to a jury trial; and (11) the relative expertise of the federal and state courts on the issues presented. *See, e.g., Lone Star Industries, Inc. v. Liberty Mutual Ins. Co.*, 131 B.R. 269 (D.Del. 1991); *Baxter Healthcare Corp. v. Hemex Liquidation Trust*, 132 B.R. 863 (N.D.Ill. 1991); *In re Riverside Nursing Home*, 144 B.R. 951 (S.D.N.Y. 1992); *Western Helicopters, Inc. v. Hiller Aviation, Inc.*, 97 B.R. 1 (E.D. Cal. 1988).

In applying these factors, we conclude that the equities in favor of retaining this action in federal court outweigh the equities in favor of remand. The genesis of this action, as in each of the other actions consolidated in this court, is Phar-Mor's fraudulent financial statements and Coopers' allegedly negligent performance in auditing such statements. Each of the consolidated cases is by or be-

tween Phar-Mor, its officers, directors and equity owners, Coopers and Phar-Mor's bankruptcy creditors. While various and diverse legal theories and causes of action abound, the central issue which we are ultimately charged to decide in all of these cases is the same: Who bears responsibility for the fraud perpetrated by Phar-Mor which resulted in losses suffered by corporations, businesses and individuals?

There is no doubt that remand of this action would waste judicial resources and could easily result in inconsistent judgments. Moreover, as rehearsed, there are no difficult or unsettled state law issues apparent on the face of the complaint such that the state court in Texas would be better suited to adjudicate this case. The nature of the claim in this action is identical to claims made by others against Coopers in the consolidated cases. Hence, much of the evidence which will be produced and many of the witnesses who will testify in the consolidated cases presently before us would also appear in any state court litigation of this action.

Additionally, while the Texas state court is obviously capable of trying this action, this court is more familiar with the subject matter of this case due to the multidistrict litigation and the similar or identical claims raised in the consolidated actions. Furthermore, as discussed, issues of comity and preference for state court adjudication of its own laws are not implicated by the instant circumstances.

Finally, FoxMeyer has not established that it would be unduly prejudiced by litigation of its claims in this forum. FoxMeyer is a corporation engaged in business throughout the continental United States. We are not persuaded

that a Pittsburgh situs will cause undue inconvenience or expense.[4]

In sum, we find that trying the instant case as part of the multidistrict litigation will promote efficient use of judicial resources, eliminate duplicative efforts, and eliminate the possibility of inconsistent judgments. At the same time, plaintiffs will neither be unduly prejudiced nor will comity between the federal and state courts suffer. We will retain this action as part of the multidistrict litigation and we will deny FoxMeyer's motion to remand.

A written order will follow.

Dated: November 5, 1993 /s/ DONALD E. ZIEGLER
Donald E. Ziegler
United States District Judge

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[4]It should also be noted that, unlike many actions which have been removed to federal court based on "related to" jurisdiction, FoxMeyer in this case does not lose its right to a jury trial. Thus, although FoxMeyer loses its initial choice of forum, for all practical purposes it is not materially prejudiced by trying its case in federal court.

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE: PHAR-MOR, INC. SECURITIES LITIGATION FOXMEYER DRUG COMPANY, *Plaintiff,* v. COOPERS & LYBRAND, *Defendant.*	CIVIL ACTION 92-1938 MDL NO. 959 MASTER FILE NO. MISC. 93-96 THIS ORDER APPLIES TO CIVIL ACTION NO. 93-0933

ORDER OF COURT

AND NOW, this 5th day of November, 1993, IT IS ORDERED that the motion of plaintiff, FoxMeyer Drug Company, to remand, or in the alternative, to abstain and remand be and hereby is denied.

/s/ DONALD E. ZIEGLER
Donald E. Ziegler
United States District Judge

United States Constitution
Article III, Section 2, Clause 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. § § 1334(b) and (c)

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or relating to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which

an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

1. Plaintiff's Original Petition, *FoxMeyer Drug Co. v. Coopers & Lybrand*; 93-1535; 193rd Judicial District, Dallas County, Texas; filed February 15, 1993.

2. Defendant's Notice of Removal; *FoxMeyer Drug Co. v. Coopers & Lybrand*; C.A. No. 3-93-CV-0470-D; Northern District of Texas, Dallas Division; filed March 8, 1993.

3. Defendant Coopers & Lybrand's Request for transfer to the Western District of Pennsylvania; Docket No. 959, Before the Judicial Panel of MultiDistrict Litigation, *In re Phar-Mor Securities Litigation;* dated March 9, 1993.

4. Defendant Coopers & Lybrand's Original Answer; *FoxMeyer Drug Co. v. Coopers & Lybrand*; C.A. No. 3-93-CV-0470-D; Northern District of Texas, Dallas Division; filed March 15, 1993.

5. Plaintiff's Motion and Brief to Remand Or In the Alternative Abstain and Remand; *FoxMeyer Drug Co. v. Coopers & Lybrand*; C.A. No. 3-93-CV-0470-D; Northern District of Texas, Dallas Division; filed March 16, 1993.

6A. Plaintiff's Reply to Defendant's Memorandum in Opposition to Plaintiff's Motion to Remand, or In the Alternative, Abstain and Remand; *FoxMeyer Drug Co. v. Coopers & Lybrand*; C.A. No. 3-93-CV-0470-D; Northern District of Texas, Dallas Division; filed April 16, 1993.

6B. Affidavit of William B. Dawson, verified April 16, 1993 (Exhibit B to Item 6A.)

7. Supplemental Brief in Opposition to Plaintiff's Motion to Remand, or in the Alternative, Abstain and

Remand; *FoxMeyer Drug Co. v. Coopers & Lybrand*; C.A. No. 3-93-CV-0470-D; Northern District of Texas, Dallas Division; filed April 16, 1993.

8. Transfer Order; Docket No. 959, Before the Judicial Panel on MultiDistrict Litigation, *In re Phar-Mor Securities Litigation*; filed May 26, 1993.

9. Joint Motion and Brief to Modify the Court's November 5 Order to Permit an Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b); *In re Phar-Mor Securities Litigation: FoxMeyer Drug Co. v. Coopers & Lybrand;* C.A. No. 93-933, MDL No. 959; Western District of Pennsylvania; filed December 15, 1993.

10. Opinion and Order Denying Joint Motion to Modify Order and to Permit an Interlocutory Appeal under 28 U.S.C. § 1292(b); *In re Phar-Mor Securities Litigation: FoxMeyer Drug Co. v. Coopers & Lybrand;* C.A. No. 93-933, MDL No. 959; Western District of Pennsylvania; filed December 28, 1993.

11. Petition for Writ of Mandamus; *In re Phar-Mor Securities Litigation: FoxMeyer Drug Co. v. Coopers & Lybrand*; 94-3071; United States Court of Appeals for the Third Circuit, filed February 18, 1994.

12. Case Management Order; *In re Phar-Mor Securities Litigation*; MDL No. 959; Western District of Pennsylvania; filed May 5, 1993.

13. Case Management Order #2; *In re Phar-Mor Securities Litigation*; MDL No. 959; Western District of Pennsylvania; filed September 15, 1993.

14. Case Management Order #3; *In re Phar-Mor Securities Litigation*; MDL No. 959; Western District of Pennsylvania; filed November 8, 1993.

15. Case Management Order #4; *In re Phar-Mor Securities Litigation*; MDL No. 959; Western District of Pennsylvania; filed March 29, 1994.

Supreme Court, U.S.
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No. 93-2014

IN THE

Supreme Court of the United States

October Term, 1993

FOXMEYER DRUG COMPANY,

PETITIONER,

v.

COOPERS & LYBRAND,

RESPONDENT.

In re FOXMEYER DRUG COMPANY,

PETITIONER.

BRIEF FOR COOPERS & LYBRAND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT and in the alternative PETITION FOR COMMON-LAW WRIT OF CERTIORARI, AND FOR WRIT OF MANDAMUS TO HONORABLE DONALD E. ZIEGLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Third Circuit abused its discretion in declining mandamus to take this case out of the normal appellate scheme, which contemplates review of jurisdictional and other rulings and correction of any errors on appeal from final judgment.

2. Whether a civil proceeding is "related to" a bankruptcy case within the meaning of 28 U.S.C. § 1334(b), so as to vest a federal court with subject matter jurisdiction, where the proceeding may affect property coming into the bankruptcy estate, may affect distribution of the Debtor's assets among creditors, and involves joint conduct by the Debtor and the Defendant.

JURISDICTION

Although Petitioner invokes 28 U.S.C. § 1254(1) as its first jurisdictional basis, reliance on this section is rendered questionable by the provisions of 28 U.S.C. §§ 1452(b) and 1334(c), which state that remand and abstention decisions (such as the District Court decision at issue here), "shall not be reviewable by appeal or otherwise . . . by the Supreme Court of the United States under section 1254 of this title." Further, as set forth below, mandamus review under 28 U.S.C. § 1651 has never been allowed in cases involving lower court denials of remand and/or abstention.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1334. Bankruptcy cases and proceedings

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1452. Removal of claims related to bankruptcy cases

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

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STATEMENT OF THE CASE

The Petitioner herein, FoxMeyer Drug Company ("FoxMeyer"), is a multi-billion dollar pharmaceuticals distributor, and was a major supplier of goods to Phar-Mor, Inc. ("Phar-Mor"), the nation's third largest retail drug chain. FoxMeyer was allegedly owed over $72 million when Phar-Mor entered bankruptcy following disclosure of a financial fraud by Phar-Mor's management. The bankruptcy was filed on August 17, 1992, in the Bankruptcy Court for the Northern District of Ohio. (App. 1, Item 1, Ex. 2.) Phar-Mor continues to operate as a Debtor-in-Possession under chapter 11 of the Bankruptcy Code.

Accountant Liability Cases

In the aftermath of the fraud and bankruptcy, Phar-Mor and many of its suppliers (such as Petitioner), lenders and investors have sued Coopers & Lybrand ("Coopers"), Phar-Mor's auditor. The first such case was brought by Phar-Mor in Pennsylvania state court, and removed to the District Court for the Western District of Pennsylvania as an action "related to" the Phar-Mor bankruptcy under 28 U.S.C. § 1334(b). (App. 1, Item 1,. Ex. 8.) Thereafter, many similar cases were brought in state and federal courts around the country. The plaintiffs (including Petitioner) claim that they did business with Phar-Mor -- buying stock, making loans, selling goods, and so on -- in reliance on Phar-Mor's pre-bankruptcy financial statements. These statements are alleged to have been negligently audited by Coopers. Some parties, including Phar-Mor itself, claim that Coopers' negligence actually caused the bankruptcy. Damages claimed by Petitioner and other supplier-plaintiffs are based on goods shipped but not paid for at the time of Phar-Mor's bankruptcy. The same amounts are claimed as debts in the Phar-Mor bankruptcy proceeding.

The Judicial Panel on Multidistrict Litigation ordered transfer of all cases arising from the Phar-Mor fraud and bankruptcy to the United States District Court for the Western District of Pennsylvania (Ziegler, J.) pursuant to 28 U.S.C. § 1407. The MDL Panel held that, while legal theories varied among the cases, they all "share factual questions concerning the financial condition of Phar-Mor and the knowledge that defendants had or should have had." (Id. Ex. 10.) Thirty-three separate actions, some with multiple plaintiffs and one purporting to be a class action on behalf of hundreds of Phar-Mor creditors, are now consolidated for pre-trial purposes in the District Court in Pittsburgh.

The chapter 11 bankruptcy case and the accountant liability case against Coopers are avowedly part of a two-prong strategy to maximize the value of the Phar-Mor Estate and the potential recovery to creditors. Although Petitioner has offered various adjectives to minimize the relationship between the anti-Coopers case and the Phar-Mor bankruptcy -- "contingent," "hypothetical," etc. -- the participants and the courts below all know that this is not correct, and have recognized bankruptcy related jurisdiction and the appropriateness of adjudication in a single forum. The following is a short list of facts and circumstances that supported these rulings both in general and as to FoxMeyer's claims at the time the MDL Panel ordered transfer and the District Court sustained jurisdiction:

- Phar-Mor itself has described its accountant's liability claims against Coopers as the "single largest asset" of the Phar-Mor bankruptcy estate (id. Ex. 9), and a principal potential source of funds to pay creditors such as FoxMeyer;

- FoxMeyer is in fact the largest trade creditor in the Phar-Mor bankruptcy, with over $70 million in claims for goods sold and delivered (id. Ex. 13); its claims against Coopers are attempts to find an alternate source of payment of its Phar-Mor debt;

- Accordingly, as the District Court held, success by FoxMeyer in its accountant's liability case will take it out of the creditor claims pool, "positively" "directly" altering the rights of all other creditors and "directly" affecting the bankruptcy case; although FoxMeyer decries this impact as "contingent," the main "contingency" is that FoxMeyer will succeed in what it is trying (very hard) to accomplish, i.e., to get payment from Coopers on account of the debts incurred by Phar-Mor;

- Further, in the FoxMeyer case and in general, Coopers has asserted that any recovery by individual creditor-plaintiffs will be an offset and recoupment against any judgment against Coopers that Phar-Mor itself may obtain; this will occur both under normal recoupment principles and because Phar-Mor is claiming as an element of its own damages the same debts on which creditor-plaintiffs seek recovery;

- Accordingly, any recovery by FoxMeyer against Coopers will reduce dollar-for-dollar Phar-Mor's eventual recovery and the proceeds flowing into the Phar-Mor bankruptcy estate; again, the main "contingency" is that the creditors suing

Coopers will accomplish what they are trying to accomplish, i.e., to get recovery from Coopers based on Phar-Mor's debts;

- The bankruptcy and creditor impact of the accountants liability against Coopers litigation was formally recognized by the Official Committee of Unsecured Creditors, when it sought to intervene in the MDL litigation on the ground that creditor rights in the bankruptcy would be impacted (see App. 1, Item 2);

- FoxMeyer, as the largest trade creditor and a continuing supplier to Phar-Mor in chapter 11, is chairperson of the Creditors Committee (App. 1, Item 1, Exs. 1, 4, 14); its present pleas for remand will thus represent something of a procedural grand-slam: keeping its direct case against Coopers in FoxMeyer's Texas court (on the theory that the case is not bankruptcy-related), meanwhile having its creditor interests represented through Creditors Committee intervention in the MDL case against Coopers (on the theory that Phar-Mor creditor interests are at stake).

As the case has progressed subsequent to Judge Ziegler's jurisdictional ruling, the relatedness of the bankruptcy and the accountants liability actions has been further evidenced in the following ways, among others:

- The Third Circuit has now ruled that Phar-Mor's case against Coopers is an "adversary proceeding" within the meaning of the Bankruptcy Code and Rules, thus giving the

Creditor's Committee (chaired by FoxMeyer) an absolute right to intervene (App. 1, Item 2);

- FoxMeyer and Phar-Mor are now in litigation in the Bankruptcy Court over delivery and payment for about $20 million of the goods that are the basis for FoxMeyer's claims against Coopers, with FoxMeyer claiming a priority right to payment (ahead of other creditors), while Phar-Mor counter-claims that FoxMeyer received preferential payments, which are recoverable by the Estate (App. 1, Item 3);

- This creates other forms of potential impact of FoxMeyer's action against Coopers, as a victory by FoxMeyer would now clearly enrich the Phar-Mor Estate by whatever amount FoxMeyer is due on its priority claims; again, the main "contingency" is whether Petitioner succeeds in what it is trying to do -- to get Coopers to pay for the underlying goods shipped to Phar-Mor;

- In deference to its bankruptcy court litigation with Phar-Mor, FoxMeyer has begun to have its bankruptcy counsel present for testimony in the MDL accountant liability case that might impact bankruptcy court litigation (App. 1, Item 4); no one has objected to the presence of FoxMeyer's bankruptcy counsel at accountant liability depositions on the ground that the bankruptcy impact of the testimony was "contingent" or that it "might not" affect the bankruptcy case.

In sum, the accountants liability cases and Phar-Mor bankruptcy arise from the same core of operative facts, are inextricably intertwined both legally and factually, and are part of the same case and controversy. As the cases progress toward final judgment, further effects and relationships will be identified. These effects will become concrete and measurable in dollars as the rights of the multitude of persons impacted by the Phar-Mor financial disaster are established by the courts.

Procedural History of the Foxmeyer Case

Petitioner commenced its case against Coopers in Texas state court about six months after the Phar-Mor bankruptcy, with damages claimed based on pre-bankruptcy shipment of goods to Phar-Mor. Coopers removed to federal court under 28 U.S.C. § 1452(a), on the ground that Petitioner's case was an action "related to" the Phar-Mor bankruptcy within the meaning of 28 U.S.C. § 1334(b)[1]. Over Petitioner's objections, its case and pending motion to remand and/or abstain were transferred by the MDL Panel to the Western District of Pennsylvania, to be decided with the similar remand/abstention motions of other state plaintiffs.

Judge Ziegler, as transferee judge, denied the remand and/or abstention motions of Petitioner and the other state plaintiffs, finding that their actions were "related to" the Phar-Mor bankruptcy within the meaning of 28 U.S.C.

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[1] Subsequent to removal, Coopers impleaded Phar-Mor as a third party defendant. If Coopers had not removed Phar-Mor undoubtedly would have done so under § 1452 (a), as it has in similar instances.

§ 1334(b). The court applied the test set forth in the governing decision of the Third Circuit in Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984), which holds that a civil action is "related to" a bankruptcy case where the outcome "could conceivably have an effect on the estate being administered." The court found that the Pacor test carried out the legislative purpose of avoiding the inefficiencies of "piecemeal adjudication" of matters affecting the administration of bankruptcies. The court noted that Pacor had specifically contemplated jurisdiction where a bankruptcy creditor seeks recovery from a third party of amounts owed by the bankrupt. (District Court Opinion, Petition App. 1 at 3-7.)

Turning to FoxMeyer's alternative motion to abstain, court held that 28 U.S.C. § 1334(c)(2), did not apply to removed cases, which are governed instead by § 1452(b) which specifically addresses remand to state court following removal. Further, the court found that exercise of jurisdiction posed no threat of inconsistent judgments or of friction between state and federal courts, since no action was pending in state court. (Id. at 7-9.)

Analyzing equitable factors under § 1452(b) the court found that the equities weighed in favor of retaining the action in federal court. FoxMeyer's action, like all the other cases in the MDL litigation, raised the same central issues as to fraud and accountants liability. Remand would waste judicial resources, since the same evidence would have to be produced and many of the same witnesses would need to testify in the remanded action as in the federal MDL litigation. The court noted that it was more familiar with the subject matter of the case than a Texas state court would be. Finally, the court found that FoxMeyer, as a corporation engaged in business throughout the United States, would not be unduly prejudiced by litigation of its claims in

Pennsylvania. (Id. at 10-12.) The District Court's decision did not include any discussion of "constitutional" issues, as none had been raised by Petitioner, which had argued only that the facts of this case fall outside the statutory grant of jurisdiction in 28 U.S.C. § 1334(b), as interpreted by the Third Circuit in Pacor.

Dissatisfied with this ruling, and apparently insensitive to litigation cost, Petitioner has now invoked every possible means of obtaining review of the District Court's interlocutory order denying remand to state court and/or abstention. First, Petitioner sought certification for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), asserting (as before) that the District Court had failed to interpret 28 U.S.C. § 1334(b) and (c)(2) correctly, and that remand was required under Pacor's interpretation of § 1334(b). This effort to obtain § 1292(b) interlocutory appeal was in derogation of the relevant statutes, 28 U.S.C. §§ 1452(b) and 1334(c)(2), which explicitly bar such review.

Petitioner then sought mandamus in the Third Circuit. This request was in derogation of Third Circuit precedents that reserve mandamus for clear judicial abuses of power and disregard of law, and hold that any burden of awaiting normal appellate review under the finality rule are not a ground for mandamus. The Third Circuit denied mandamus without opinion on March 25, 1994.

Thereafter, the present Petition for certiorari and/or mandamus was filed.

ARGUMENT

I. MANDAMUS REVIEW OF AN INTERLOCUTORY ORDER DENYING REMAND TO STATE COURT WOULD BE UNPRECEDENTED, AND WOULD BE CONTRARY TO LONG-STANDING LEGISLATIVE AND JUDICIAL POLICIES.

A. Mandamus Is Not a License to Evade the Final Judgment Rule, and Is Particularly Disfavored as a Vehicle to Obtain Review of Refusals to Remand or Abstain.

The vice of mandamus is that, when directed to federal courts, it tends to evade the long-standing rule of finality, which postpones appellate review until rights have been finally adjudicated. Mandamus is accordingly restricted to truly extraordinary cases of "clear and indisputable" abuses by lower courts, where an aggrieved party has no other adequate avenue to obtain review. E.g., Kerr v. United States District Court, 426 U.S. 394, 403 (1976) (affirming denial of mandamus); Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988) (denying mandamus to review abstention decision); Will v. United States, 389 U.S. 90, 96 (1967); Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) (per curiam); see generally, Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987) (vices of interlocutory review); Firestone Tire & Rubber Co. v .Risjord, 449 U.S. 368, 380 (1981).

Where a party challenges denial of remand to state court, this Court has clearly stated that mandamus is not available to obtain interlocutory review. Thus, in Roche v. Evaporated Milk Association, 319 U.S. 21, 30 (1943) (cited by FoxMeyer at p. 23 of the Petition), the Court stated as follows:

> "For that reason [respect for the finality rule] this Court has consistently refused to sustain the use of mandamus as a means of reviewing the action of a district court in denying a motion to remand a case to the state court from which it had been removed." (Citations omitted).

Accord, Ex Parte Harding, 219 U.S. 363, 369 (1911) ("there is nothing peculiar in an order refusing to remand which differentiates it from any other order or judgment of a court of the United States concerning its jurisdiction"); In Re Ivy, 901 F.2d 7, 10 (2d Cir. 1991) (denial of remand may not be reviewed by mandamus).

Although Petitioner apparently advocates broad use of mandamus where a party alleges a "jurisdictional" error (Petition at 23-27), this is not supported by precedent and would undercut the normal prerogative of a federal court to "determine its own jurisdiction." E.g., Ex Parte Harding, supra, 219 U.S. 363, 364 (1911); see generally, Land v. Dollar, 330 U.S. 731 (1947); 13A Wright, Riller & Cooper, Federal Practice and Procedure § 3536 at 535 (2d ed. 1984) (if jurisdiction is questioned, "the court has the power and the duty, subject to review, to determine the jurisdictional issue").

Nor would mandamus have been appropriate even if Petitioner could show a grievous error in the District Court's ruling. In American Airlines, Inc. v. Forman, 204 F.2d 230, 232 (3d Cir. 1953), the Third Circuit described the narrow role of mandamus as follows:

> "The relief sought here [by mandamus] is not in aid of our appellate jurisdiction. Rather, it is an unwarranted anticipation of that jurisdiction.

* * *

> "The challenged assumption or denial of jurisdiction must be so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine. If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus . . . even though on normal appeal a reviewing court might find reversible error."

Accord, Pfizer, Inc. v. Lord, 522 F.2d 612, 615 (8th Cir. 1975), cert. denied, 424 U.S. 950 (1976) (quoting Forman) (writ to review jurisdiction over foreign governments under the Clayton Act denied); American Fidelity Fire Ins. Co. v. United States District Court, 538 F.2d 1371 (9th Cir. 1976).

Petitioner's citation to Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976), only shows the great gulf separating the present case from anything remotely suggestive of mandamus. The respondent district judge in Thermtron, having obtained jurisdiction on removal, remanded the case back to state court due to his "crowded docket." (Id. at 340.) This decision was in clear disregard of the governing statute and was based on grounds which the court "had no authority to consider." (Id. at 350.) The extraordinary circumstances of Thermtron were emphasized again in the later case of Carnegie-Mellon University v. Cohill, 484 U.S. 343, 356 (1988), where the Court stated that "federal courts have no greater power to remand cases because of an overcrowded docket than they have to dismiss cases on that ground." Further underlying the decision in Thermtron was the fact that, absent mandamus review, the party aggrieved by the clear and seemingly intentional

disregard of law would have no opportunity for appellate review, since the remanded case would not thereafter receive a final order from any federal court.[2]

The present case, by contrast, shows a district judge carefully following the governing jurisdictional statute as interpreted by controlling Third Circuit precedent. The ruling is also in accord with the rule followed in other Circuits. (See Point II, infra.) Such rulings may be reviewed only by appeal from a final judgment.

B. Purported Burdens of Litigation Have Consistently Been Rejected as a Ground for Mandamus.

The supposed burdens and inconveniences of awaiting final judgment (Petition at 23 - 25) which could equally be raised by any unsuccessful applicant for remand or abstention have not been found to justify mandamus review, even when asserted by parties more sensitive to cost than a multi-billion dollar company such as Petitioner FoxMeyer. E.g., Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 30 (1943) (reversing mandamus; "Respondents stress the inconvenience of requiring them to undergo a trial in advance

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[2] The other cases cited by Petitioner are equally unhelpful to its position. As noted above, Petitioner apparently did not notice the passage in Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 30 (1943), which virtually bars use of mandamus in denial of remand cases, such as the present case. Petitioner also cites Hoffman v. Blaski, 363 U.S. 335 (1960), in which the Court noted that use of mandamus as a review mechanism was not contested (id. at 340), and that the Supreme Court's grant of certiorari review was based on the "great conflict and confusion" that had arisen in the lower courts. (Id. at 339n.8.)

of an appellate determination of the challenge now made. . . .But that inconvenience is one which we must take if Congress contemplated it providing that only final judgments should be reviewable."); Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383-84 (1953) (denying mandamus; "it is established that the extraordinary writs cannot be used as a substitute for appeals, even though hardship may result from delay and perhaps unnecessary trial"); Ex Parte Park Square Automobile Station, 244 U.S. 412, 414-15 (1917) (mandamus not available despite claim that party would be forced to undergo trial in the wrong state); see also, Stringfellow, supra, 480 U.S. 370, 376-77 (1987) (rejecting argument that "complex litigation" justifies exception to final order rule); Van Cauwenberghe v. Baird, 486 U.S. 517, 524 (1988) (even litigants with meritorious claims for dismissal, "must abide by the district court's judgments, and suffer the concomitant burden of a trial"). Although Petitioner stresses the supposed complexity of the MDL litigation, this factor actually supports strict application of the finality rule. E.g., Stringfellow, supra, 480 U.S. at 376-77; In re Recticel Foam Corp., 859 F.2d 1000, 1006 (1st Cir. 1989) ("the importance of the finality requirement is at its zenith in large cases such as this").

Moreover, despite Petitioner's statements about litigation burdens, the truth is that FoxMeyer has been subject to burdens similar to those that state litigation would entail, and is the beneficiary of efficiencies associated with the consolidated pre-trial proceedings. Thus, deposition witnesses have testified in their home cities, with Coopers and other parties going to Texas to depose FoxMeyer witnesses, and to Pittsburgh for the testimony of Coopers and Phar-Mor witnesses who live in that city or nearby Youngstown, Ohio, Phar-Mor's headquarters. Where other plaintiff witnesses have been deposed, FoxMeyer has chosen not to attend, just as if the cases had not been consolidated.

Still, it gets the benefit of transcripts and document discovery generated by all other parties. FoxMeyer also has the benefit of an intensive plaintiff-driven effort to challenge the Coopers audits. All parties have the benefit of a District Judge who knows all facets of the case, and has placed it on a fast track, with completion of fact discovery scheduled for September 30, 1994.

In sum, even if litigation burden were a ground for mandamus, a proposition always rejected by this Court, FoxMeyer cannot claim any unusual burdens in this case. Litigation is never cost free, especially for a commercial litigant seeking a $72 million recovery in a financial fraud and accountant malpractice case that would be deemed complex in any court. Nor can FoxMeyer, which for years pursued (and still pursues) profitable dealings with the Pennsylvania- and Ohio-based Phar-Mor, and now seeks payment for goods shipped to Phar-Mor, be surprised if it has to submit to a venue chosen by the bankrupt Phar-Mor to get recovery on these claims.[3]

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[3] Although the Petitioner repeatedly refers to this case as a purely "local" dispute (e.g., Petition at 7), it is not clear what this means in the context of a $2.7 billion contract for sales of goods between a national distributor (FoxMeyer) and a national retailer (Phar-Mor), and the alleged negligence of a national accounting firm ("Coopers'). Perhaps FoxMeyer means that it was able to find an office of Coopers in Dallas (as could plaintiffs in many other cities) on which to serve a summons. In fact, the challenged audit work was done out of Coopers' Pittsburgh office, and the resulting opinion was rendered to Phar-Mor's Board of Directors in Pittsburgh. The MDL Panel and the District Court correctly found that Pittsburgh is the factual center and most suitable venue for this case.

C. Constitutional Issues Are Not Ripe for Review at This Stage.

Due to the unusual and accelerated procedural path employed by Petitioner, neither of the Courts below has addressed the constitutional arguments now put forward. (E.g., Opinion below, Petition App. 1.) Indeed, on appeal from final judgment, the Third Circuit might well accept Petitioner's contentions that the District Court incorrectly interpreted § 1334(b) and/or deem the potential impacts here to be excessively "contingent." Further, as has occurred since the District Court's decision sustaining jurisdiction, additional facts or relationships to the bankruptcy may come into existence or may be discovered that could have a bearing on the jurisdictional discussion, and render unnecessary the adjudication of constitutional questions.

In light of the foregoing, it would be appropriate at this juncture to defer consideration of any constitutional arguments until final judgment, which may render moot or place in a more complete and sharply focused legal and factual setting any remaining constitutional issues. See generally, Finley v. United States, 490 U.S. 545, 549 (1989) (declining to reach jurisdictional issues under article III where statutory ground was available); Neese v. Southern Railway Co., 350 U.S. 77, 78 (1955) (per curiam); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-47 (1936); Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co., 389 U.S. 327 (1967) (per curiam).

II. THE DISTRICT COURT'S DECISION DID NOT DISREGARD LAW OR USURP JUDICIAL POWER, BUT FOLLOWED GOVERNING THIRD CIRCUIT PRECEDENT, ADOPTING A JURISDICTIONAL RULE THAT IS ENDORSED BY COURTS THROUGHOUT THE COUNTRY.

A. The District Court Invoked and Applied the Jurisdictional Test That Prevails in the Third and All Other Circuits.

FoxMeyer seeks review of the Third Circuit's denial of its petition for mandamus on the grounds that the lower court's opinion "dramatically expand[s]" the scope of subject matter jurisdiction. (Petition at 7). As shown in detail below, however, the court's decision that FoxMeyer's action is "related to" Phar-Mor's bankruptcy was well within settled and consistent case authority, which carries out Congress's intent in enacting § 1334(b).

The circuit courts are in full accord concerning the scope of the federal courts' subject matter jurisdiction over bankruptcy-related proceedings under 28 U.S.C. § 1334(b). The First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have all endorsed the standard announced by the Third Circuit in its Pacor decision, that a proceeding that could "conceivably" affect the outcome or administration of a federal bankruptcy case is sufficiently "related to" the bankruptcy case to support jurisdiction. See In re Cuyahoga Equipment Corp., 980 F.2d 110, 114 (2d Cir. 1992); In re G.S.F. Corp., 938 F.2d 1467, 1475 (1st Cir. 1991); In re Gardner, 913 F.2d 1515, 1518 (10th Cir. 1990); In re Lemco Gypsum, Inc., 910 F.2d 784, 788 (11th Cir. 1990); In re Fietz, 852 F.2d 455, 457 (9th Cir. 1988); In re Wood, 825 F.2d at 90, 93 (5th Cir. 1987); In re

Dogpatch U.S.A., Inc., 810 F.2d 782, 786 (8th Cir. 1987); A.H. Robins Co., Inc. v. Piccinin, 788 F.2d 994, 1002 n. 11 (4th Cir.), cert. denied, 479 U.S. 876 (1986).

Contrary to the Petitioner's references to "boundless" jurisdiction, in fact, test is not satisfied by highly attenuated or remote connections. See In re Salem Mortgage Co., 783 F.2d 626, 634 (6th Cir. 1986); In re Xonics, Inc., 813 F.2d 127 (7th Cir. 1987). Indeed, Pacor itself, which first used the word "conceivably," found no jurisdiction on the case before it due to the weak and speculative bankruptcy connection.

This standard carries forward Congress's intention in granting the federal courts jurisdiction over bankruptcy-related proceedings. "Congress was concerned with the inefficiencies of piecemeal adjudication of matters affecting the administration of bankruptcies and intended to give federal courts the power to adjudicate all matters having an effect on the bankruptcy." In re Wood, 825 F.2d at 92, citing S. Rep. No. 989, 95th Cong., 2d Sess., 153-54 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5939-40. Accord, Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 n.40 (1982) ("[W]e note that one of the express purposes of the [Bankruptcy Reform Act of 1978] was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes.").[4]

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[4] As FoxMeyer apparently concedes, Marathon did not contain anything that conflicts with the Circuit Courts' broad interpretation of jurisdiction over bankruptcy-related cases. See Petition at 15-16, and 16 note 6. Accord, Wood, 825 F.2d at 92-93 ("The

(Footnote continued)

The particular bankruptcy relationship identified by the District Court was also squarely within governing precedent. The Third Circuit in Pacor had devoted specific attention to the situation where a plaintiff is also a bankruptcy creditor. "Related to" jurisdiction exists because such an action:

> will necessarily affect that creditor's status vis-a-vis other creditors, and administration of the estate therefore depends upon the outcome of that litigation." (Pacor, supra, 743 F.2d at 995-96.)

This creditor-plaintiff effect is clearly evident in the present case, where FoxMeyer seeks payment from Coopers for goods delivered to Phar-Mor, meanwhile pursuing the same recovery in Phar-Mor's bankruptcy. If it succeeds against Coopers, this will effectively satisfy its bankruptcy claim as a trade creditor to Phar-Mor, thus taking FoxMeyer out of the creditor pool and altering the rights of all other creditors. See, e.g., In re Showcase Natural Casing Co., 54 B.R. 142, 143 (Bankr. S.D. Ohio 1985) (judgment "will necessarily reduce plaintiff's claim against the debtor"); Howard Brown Co. v. Reliance Ins. Co., 66 B.R. 480, 481-82 (E.D. Pa. 1986) ("resolution of this case may affect plaintiff's status as creditor . . . by reducing or eliminating its claim against the bankruptcy estate"); In re M. Paolella & Sons, Inc., 85 B.R. 965, 972 (Bankr. E.D. Pa. 1988) ("if plaintiffs

(Footnote continued from previous page)

holding in Marathon suggests no concern over the constitutionality of the scope of bankruptcy jurisdiction defined by Congress.").

prevail . . . their unsecured claims against the estate will be reduced to the extent damages are recovered"); Dak Mfg. Corp. v. Coordinated Components Corp. (In re Dak Mfg. Corp.), 73 B.R. 917, 921 (Bankr. D.N.J. 1987).

Although this creditor-plaintiff effect was correctly viewed as dispositive in favor of jurisdiction based on Pacor, the District Court could equally have sustained jurisdiction on several other recognized grounds. Thus, the fact that Coopers may use any eventual FoxMeyer recovery as a setoff and recoupment against any Phar-Mor recovery exemplifies the strongest form of bankruptcy-related jurisdiction, where the outcome of litigation could effect property or value coming into the estate.[5] Other courts have identified the bankrupt debtor's participation in underlying event and the fact that a lawsuit involves the "joint conduct" of the debtor

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5 E.g., Diamond Mortgage Corp. v. Sugar, 913 F.2d 1233, 1239 (7th Cir. 1990) cert. denied, 111 S. Ct. (1991; (jurisdiction where action "may have direct and substantial impact on the asset pool available for distribution to the estate"); Matter of Xonics, Inc., 813 F.2d 127, 131 (7th Cir. 1987) (jurisdiction clear where dispute "affects the amount of property available for distribution"); Gentilcore v. Dismondi & Margolis, Adv. No. 92-0021, 1993 WL 5897 at *3 (Bankr. W.D. Pa. Jan. 5, 1993) (creditors' claim against debtors' law firm for breach of fiduciary duty "affects both funds available for distribution and the claims against them."); In re Dak Mfg. Corp., 73 B.R. 917, 921 (D.N.J. 1987) (finding jurisdiction where defendant claimed that judgment against him would create "setoff" against the Debtor").

and non-debtor defendants as a factor supporting jurisdiction.[6]

In sum, the present case clearly supports "related-to" jurisdiction under the Third Circuit's test and under any recognized interpretation of 28 U.S.C. § 1334(b).

B. Petitioner's Attacks on the District Court Decision Are Confused and Self-Contradictory.

1. Outcomes and Impacts of Litigation Are Always Contingent.

At some points in the Petition, it seems that Petitioner objects mainly to the "contingent" nature of the potential effects on other bankruptcy creditors that Pacor and the District Court identified. Several adjectives are employed to express this argument: "hypothetical," "indirect," "conceptually limitless," "boundless," "collateral," "remote," etc. (Petition at 9-16.) The main point of attack is the word "conceivable" which has been used by most of the Courts of Appeals, mainly to express the ideas that, (i) legislative intent would be defeated by a narrow view; and (ii) a sound jurisdictional test can't require forecasts about the merits of

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6 E.g., In re Wood, supra, 825 F. 90, 94 (finding jurisdiction over claims "resulting from the joint conduct of the debtor and non-debtor defendants"); In re Salem Mortgage Co., supra, 783 F.2d 626, 635 (6th Cir. 1986) (noting that bankrupt parties had close and "intertwined" relationship to litigating parties); In re Cardinal Industries, Inc., 126 754, 758 (S.D. Ohio 1991) ("intertwined relationship . . . tends to uphold a finding of jurisdiction"); In re Zamost, 7 B.R. 859 (Bankr. S.D. Cal. 1980).

the case or spend too much time at the threshold trying to predict precise impacts in the fluid environment of a bankruptcy.

The problem with Petitioner's approach is that it is more a semantical dispute over adjectives than a legal issue. Everyone agrees (including the District Court, the Third Circuit, and the other Courts of Appeals) that there must be a sufficiently strong and non-speculative potential impact for a case to be one "related to" a title 11 case within the meaning of 28 U.S.C. § 1334(b). Even FoxMeyer seems to agree that a stronger or less "contingent" effect in this case would support jurisdiction. Petitioner's real complaint is that it couldn't convince the District Court of its factual contentions on the question of whether the effect in this case is strong enough and likely enough.

The District Court clearly has the better side of the factual debate. Although Petitioner has strained to make lists of "contingencies" (e.g., Petition at 6), the main contingency is that Petitioner will succeed in what it has set out to do, i.e., recover payment from Coopers for the debts incurred by Phar-Mor. It would be a strange form of jurisdiction indeed that could be defeated by the observation that a plaintiff that it might lose its case. Nor would any sound jurisdictional doctrine demand inquiry at the jurisdictional stage into the other contingencies identified by Petitioner, including such future events as whether there will ultimately be funds to distribute to trade creditors and other matters that must necessarily await bankruptcy administration.

In reality, uncertainties and contingencies as to outcome and ultimate effect are an integral part of any litigation and any bankruptcy. They can't be eliminated by any jurisdictional test. Nor would they be eliminated (only turned upside-down) by the test FoxMeyer seems to advocate

here, i.e., that jurisdiction would be defeated wherever a case "conceivably might not" impact a pending bankruptcy proceeding.

2. Any Supposed "Federal Interest" Test is Clearly Met.

At other points in the Petition, FoxMeyer seems to argue that there should be a "federal interest" analysis, using terminology that is sometimes seen in cases of federal question jurisdiction under 28 U.S.C. § 1331, but has not generally been used in discussion of § 1334(b). If jurisdiction were to be analyzed in such terms, however, it would be beyond question that there is a "federal interest" in the administration of bankruptcy estates, as amply evidenced by the massive Title 11 of United States Code (the "Bankruptcy Code") and the constitutional provision (Art. I, Sec. 8, Cl. 4) which grants power over bankruptcies to the federal government. The analysis employed by the District Court, following the teaching of the Third Circuit in Pacor, could easily be fit into this approach, because it is founded on identifying impacts on the federal bankruptcy administrative process. As stated above, there are many such potential impacts in this case, including some that were identified in the District Court decision and some that have become apparent subsequently, and each such impact implicates the federal interest in bankruptcy administration.

3. The Views Expressed in the Supposed Legislative History Cited in the Petition Are Partisan Comments That Have Been Rejected by Congress and the Courts.

At other points, Petitioner cites "legislative history" in support of the view that state created rights may not be brought into federal courts at all under the heading of bankruptcy jurisdiction. (Petition at 11-12, 19.) This

material seems to contradict FoxMeyer's main position that exercise of jurisdiction over state claims would be acceptable if the bankruptcy nexus were less "contingent."

In fact, this "legislative history" represents a narrow view of jurisdiction that was rejected in 1978, when the Bankruptcy Code and jurisdictional scheme was enacted, and again in 1984, when bankruptcy-related jurisdiction was reaffirmed following this Court's decision in Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). Although FoxMeyer quotes remarks by Senator Hatch supposedly made during floor debates, this Court has refused to accept comments by individual congressmen as a controlling guide in construing statutes.[7] These remarks are the only basis for FoxMeyer's assertion that "[i]t was unquestioned [in Congress] that applying 'related to' jurisdiction in cases . . . involving only state-law claims between nondiverse and nonbankrupt parties would violate Article III § 2." (Petition at 12.) In fact, courts and commentators have agreed that "related proceedings" include suits between third parties that affect the administration of a Title 11 case. See 1 Collier's on Bankruptcy ¶ 3.01[1][c][iv] at 3-29 through 3-31, citing cases.

FoxMeyer's jurisdictional propositions, which directly contradict § 1334(b) and years of jurisprudence under it, actually originated not in legal precedents but in statements of Senator Hatch and other congressional opponents of broad bankruptcy jurisdiction, who saw in the Marathon decision

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7 See Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs, 113 S.Ct. 692, 700 (1993); Weinberger v. Rossi, 456 U.S. 25, 35 n. 5 (1982).

and the resulting 1984 amendments an opportunity to reassert the narrow jurisdictional view, which had been rejected in 1978.[8] While this effort failed to dislodge broad jurisdiction, it produced some special exemptions for personal injury and wrongful death claims (e.g., U.S.C. § 157(b)(2)(B)) and a so-called "mandatory abstention" provision, the present § 1334(c)(2). In the process, a number of anti-jurisdictional statements were placed in the Congressional Record and similar sources of "legislative history."[9] Attempting to track and understand these demonstrably contradictory and incorrect statements, which betray ignorance of both Marathon and elementary principles of jurisdiction, one court stated that "one has to wonder whether, in 1984 at least, Congress even knew its mind," and called for repeal of § 1334(c)(2). In re Branded Products, Inc., 142 B.R. 936, 941-944, 946n.14 (Bankr. W.D. Tex. 1993); see also, Collier on Bankruptcy ¶ 3.01 [3][b] at 3-77.

In fact, the idea that state law claims are outside the permissible bankruptcy subject matter jurisdiction (absent diversity or a federal question) is nonsense. State law claims

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8 Jurisdiction over cases "related to cases under title 11," now embodied in § 1334(b), was first enacted in 1978 as 28 U.S.C. § 1471(b).

9 Indeed, these statements are not even Committee Reports or other attempts to report any consensus, but merely the views of independent legislators placed in the Congressional Record. See 1984 U.S. Code, Cong. and Admin. News at 576, et seq. There is no way to know at this point whether these statements were actually spoken aloud in Congress (written materials are often submitted without public airing), who if anyone was present to hear and to what extent they agree or conflict with the views of the hundreds of other legislators who voted on the 1984 amendments.

are adjudicated all the time in the bankruptcy process, particularly in the resolution of claims, which almost always involve torts, contracts or other state created rights. Indeed, the narrow view of jurisdiction, rejected by Congress both in 1978 and in 1984, would create an unworkable system where:

> "all claims litigation should proceed via law suits in state court before being handled in bankruptcy, a reading that would convert bankruptcy into a cumbersome, hyperextensive and thoroughly impracticable remedy completely out of step with the Bankruptcy Code itself. No court has ever given to section 1334(c)(2) the interpretation here suggested . . . ."

In re Branded Products, Inc., 154 B.R. 936, 942-43 n. 14 (Bankr. W.D. Tex. 1993).

Nor has this Court ever read the Constitution to confine the federal courts' power to adjudicate cases affecting bankruptcy as FoxMeyer asserts. Marathon, for example, did not hold that the broad grant of jurisdiction to bankruptcy courts was inconsistent with Article III of the Constitution. Indeed, the Marathon plurality held that the claim at issue there "may be adjudicated in federal court on the basis of its relationship to the petition for reorganization." Id. at 72, n.26. Jurisdiction under Article III, section 2 of the Constitution has been broadly construed. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 492 (1983); Osborn v. Bank of United States, 9 Wheat. 738, 822 (1824). This Court has never doubted Congress's power to confer jurisdiction on federal courts in matters affecting the administration of bankruptcy estates. See Williams v. Austrian, 331 U.S. 642, 652-53 (1947) (where Congress had

exercised its bankruptcy powers to confer upon federal courts jurisdiction conditioned upon a defendant's consent, no independent ground for federal jurisdiction was required); Schumacher v. Beeler, 293 U.S. 367, 374 (1934) (same); National Ins. Co. v. Tidewater Co., 337 U.S. 582, 611-12 (Rutledge, J. concurring) (suit by trustee in federal court on action that debtor could have brought only in state court is one "arising under the laws of the United States").

4. "Abstention" Under § 1334(c)(2) Has Nothing to do with Subject Matter Jurisdiction Or Article III of the Constitution.

FoxMeyer seriously misunderstands the nature of subject matter jurisdiction and abstention when it repeatedly asserts that § 1334(c), which calls for "abstention" in certain circumstances, is "necessary to confine trial courts within the scope of their Article III authority." (Petition at 27; see id. at 7, 18.) This confuses the doctrine of abstention with that of jurisdiction. Rather, under traditional notions of abstention, a court declines to assert its otherwise valid subject matter jurisdiction over a particular matter, finding that the matter is better resolved in another court. See, e.g., Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 501 (1941) (abstention is a doctrine whereby federal courts, exercising a wise discretion, restrain their authority); Burford v. Sun Oil Co., 319 U.S. 315, 333 n.29 (1943) ("Equity's discretion to decline to exercise its jurisdiction may be

applied when judicial restraint seems required by considerations of general welfare.").[10]

Especially unsound is the idea (adopted by FoxMeyer from Senator Hatch) that, if there were a problem with subject matter jurisdiction, abstention under § 1334(c)(2) would do anything to solve it. It is axiomatic that subject matter jurisdiction is fundamental, cannot be conferred by waiver or consent of private parties, must be raised sua sponte, and must be raised at any time when a defect appears. It must also be raised by an appellate court after judgment, even if the parties and the lower court fail to notice a jurisdictional issue. E.g., Insurance Corp. of Ireland v. Compagnie Des Bauxites de Guinee, 456 U.S. 694, 702 (1982); UIW v. Gov't of Virgin Islands, 987 F.2d 162, 163 (3d Cir. 1992).

In contrast, § 1334(c)(2) expressly depends on such factors as a "timely motion of a party," and such criteria as whether a case is commenced in another court and can be "timely adjudicated." It then purports to insulate any rulings from appellate review. All these terms proclaim with crystal clarity that § 1334(c)(2) really is not about "subject matter

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10 It is a fundamental tenet of statutory construction that a particular statutory provision is not to be read in a way that frustrates the purpose of the statute. As this Court has written, "[I]n determining the meaning of a statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." Crandon v. United States, 494 U.S. 152, 158 (1990); accord, Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 228 (1986); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956). Here, the relevant policy is to ensure the expeditious resolution of the debtor's bankruptcy and to avoid piecemeal litigation.

jurisdiction." To allow this clarity to be muddied by statements placed in the record by individual legislators exemplifies the mischief that can result from uncritical reliance on supposed "legislative history."[11]

In sum, any issue FoxMeyer has with subject matter jurisdiction should be raised, analyzed under the jurisdictional grant of § 1334(b) and rejected under its proper name, not through the proxy of "mandatory abstention."

Again, the District Court clearly made the correct decision in declining the invitation to abstain, relying on many cases holding that remand decisions are not subject to mandatory abstention under § 1334 (c)(2), but are governed by the statute that specifically treats remand of removed cases, 28 U.S.C. § 1452(b). Further, because lawsuits by Phar-Mor creditors against Coopers have continued to proliferate, a holding that the district court is required to abstain under § 1334(c)(2) would result in a multiplicity of state court actions, all addressing the very same events and transactions and posing the same central issues. These disparate state actions, in which Phar-Mor is or will become a third party defendant, would involve much the same evidence and many of the same witnesses, and could only prolong bankruptcy proceedings and delay their resolution.[12]

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11 E.g., Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring); Note, Why Learned Hand Would Never Consult Legislative History Today, 105 Harv. L. Rev. 1005, 1017-21 (1992) (tracing the degradation and questionable reliability of many legislative materials.)

12 Coopers has been sued in state and federal courts in Texas, New Jersey, Pennsylvania, Ohio, Illinois New York and Kentucky.

(Footnote continued)

Furthermore, these disparate state actions would proceed alongside the continuing MDL litigation. In effect, FoxMeyer invites this Court to fire the starting gun of a race to judgment. The risk of inconsistent holdings and the waste of judicial resources--not to mention the frustration of the Bankruptcy Court's efforts to resolve the Chapter 11 case as expeditiously as possible -- are manifest.

FoxMeyer's assertion that § 1334(c)(2) is to be broadly applied also ignores this Court's repeated admonition that abstention is appropriate only in a narrow class of cases. "This Court repeatedly has stated that the federal courts have a 'virtually unflagging obligation' to exercise their jurisdiction except in those extraordinary circumstances 'where the order to the parties to repair to the State court would clearly serve an important countervailing interest.'" Deakins v. Monaghan, 484 U.S. 193, 203 (1988), citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976); Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 14-15 (1983).

(Footnote continued from previous page)

Section 1334(c)(2) provides for abstention only where timely adjudication in the state court is possible. In view of the multitude of state law cases all involving the same evidence and requiring testimony by many of the same witnesses, it is obvious that adjudication in the state courts could not possibly be "timely," but would inevitably frustrate the expeditious resolution of Phar-Mor's Chapter 11 bankruptcy.

CONCLUSION

For the above reasons, FoxMeyer's petition should be denied.

July 18, 1994

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Appendix 1

1. Affidavit of David W. Wiltenberg, and Exhibits thereto, filed on April 5, 1993, in Opposition to Plaintiff's Motion to Remand or, in the Alternative, Abstain and Remand.

2. Phar-Mor, Inc. v. Coopers & Lybrand, No. 93-3368 (slip op.) (United States Court of Appeals for the Third Circuit, filed April 11, 1994).

3. Complaint in Adversary Proceeding, Phar-Mor, Inc. v. FoxMeyer Drug Co., Adv. Pro. No. 94-4035.

4. Excerpts from transcripts of testimony of Robert L. King, former Chief Executive Officer of FoxMeyer.

(3)

Supreme Court, U.S.
AUG 9 1994
OFFICE OF THE CLERK

No. 93-2014

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1993

FOXMEYER DRUG COMPANY,

Petitioner,

v.

COOPERS & LYBRAND,

Respondent.

In re FOXMEYER DRUG COMPANY,

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

and in the alternative

FOR COMMON-LAW WRIT OF CERTIORARI AND WRIT OF MANDAMUS TO HONORABLE DONALD E. ZIEGLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF IN SUPPORT OF PETITION

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REPLY BRIEF IN SUPPORT OF PETITION

I. Mandamus is the Only Available Means to Effectively Review the District Court's Order.

Coopers is simply wrong in its assertion that mandamus is inappropriate because the district court's order refusing to remand, or alternatively to abstain, can be reviewed following appeal from a final judgment. 28 U.S.C. § 1334(c)(2) expressly precludes review of mandatory abstention determinations through ordinary avenues of

appeal. Under § 1334(c)(2), mandamus is the only vehicle for obtaining review of mandatory abstention orders, either in the court of appeals or in this Court. This lack of opportunity for appellate review itself justifies exercising the Court's authority pursuant to 28 U.S.C. § 1651 to resolve the important federalism issues raised by the district court's order. *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336 (1976). Coopers itself recognizes that the absence of "opportunity for appellate review" justifies mandamus. (Brief in Opposition at 11-12)

It is true that the portion of the district court's order refusing to remand the action despite the absence of federal jurisdiction is reviewable on appeal from a final judgment. And, as Coopers points out, mandamus is ordinarily not available simply because a lower court has improperly exercised jurisdiction. (Brief in Opposition at 9-12) This is hardly the ordinary case, however. Here the jurisdictional error both subjects FoxMeyer (and the federal judicial system) to the extraordinary expense of a wholly unnecessary MDL proceeding, and, when coupled with the abstention ruling, turns the important congressional policy favoring state-court resolution of local (*i.e.* nonfederal) disputes on its head. The need to preserve this important policy justifies review of the district court's order by mandamus. *United States Alkali Exp. Ass'n v. United States,* 325 U.S. 196, 203-204 (1945).

Perhaps more importantly, given that a portion of the district court's order can only be reviewed by mandamus, the policy against piecemeal review of trial court determinations would not be implicated by also reviewing on mandamus the rest of the order at issue — especially when the rulings are so closely related as here. For these

reasons, review should be granted with respect to the entirety of the district court's order.

II. The District Court's Refusal to Abstain Undermines a Significant Congressional Restriction on the Exercise of Federal Bankruptcy Jurisdiction.

The district court ignored its mandatory obligation to abstain under 28 U.S.C. § 1334(c)(2). Section 1334(c)(2) was enacted in 1984 to limit expansive exercises of "related to" bankruptcy jurisdiction under 28 U.S.C. § 1334(b). The possibility that courts might exercise "related to" jurisdiction over actions only tangentially related to pending bankruptcies raised concerns over "a super court bankruptcy system . . . able to supersede any State court in this country." 130 CONG. REC. S17152 (June 19, 1984); S. REP. No. 98-55, 98th Cong., 1st Sess. 1, 18 (1983). Unable to agree on language that would expressly restrict "related to" jurisdiction, Congress instead enacted § 1334(c)(2) to protect against federal intervention in state court matters where no federal interest was implicated.[1]

The only federal interest that could justify an assertion of "related to" bankruptcy jurisdiction over state-law claims pending between nondiverse parties in state court is the interest in orderly administration of a pending bankruptcy. That interest would only be implicated if an untimely state-court adjudication of the action would

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[1]Of course requiring the district court to abstain would not correct an unconstitutional assumption of jurisdiction by the court. (*See* Brief in Opposition at 27) While this metaphysical point may have been lost on Congress in enacting § 1334(c)(2), Congress did recognize that an order abstaining in deference to state-court adjudication would have the same functional impact on an action as an order remanding or dismissing the action for lack of federal jurisdiction.

disrupt or delay the bankruptcy. If, however, the state court can promptly adjudicate the action, there can be no federal interest to justify the exercise of federal court authority. Section 1334(c)(2) thus provides that if the action "can be timely adjudicated, in a State forum of appropriate jurisdiction," the court's obligation to abstain is mandatory. FoxMeyer established in the district court that this case can be timely adjudicated in the state court where it was properly commenced, and neither the district court nor Coopers has ever contested the point.[2] Because the state court can timely adjudicate FoxMeyer's action against Coopers, there is absolutely no federal interest in preempting that adjudication. The district court thus had a mandatory obligation to abstain.

Coopers' Brief in Opposition largely ignores the abstention issue. Though Coopers states without analysis that mandatory abstention under § 1334(c)(2) does not apply in removed cases, the circumstances requiring abstention arise almost exclusively in the context of removed cases. The petition demonstrates that Coopers' interpretation in effect renders § 1334(c)(2) always inapplicable (Petition at 22). Rather than arguing the applicability of § 1334(c)(2), Coopers' principal response is instead that requiring abstention is a bad idea. (Brief in Opposition at 28-29) Congress thought differently, however, and Coopers' argument is addressed to the wrong forum. If § 1334(c)(2) is to be repealed, that is a decision for

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[2]Coopers now suggests, however, that because state *and* federal suits have been filed against it in seven jurisdictions, none of the state actions could be timely adjudicated. (Brief in Opposition at 28-29 n.12) This bizarre suggestion is flatly wrong on the record in this case, and is utterly at odds with the express language and manifest purpose of § 1334(c)(2).

Congress alone to make by new legislation, not the district court by vitiating the statute.

III. No Substantial Federal Interest Justified the Exercise of Jurisdiction by the District Court.

The same absence of any federal interest in this action that requires abstention also compels the conclusion that there is no basis for the exercise of federal subject-matter jurisdiction. Though Coopers suggests that the existence of a federal interest is irrelevant to whether federal question jurisdiction exists under Article III, section 2 of the Constitution (Brief in Opposition at 22), the Court has insisted from its earliest days of interpreting Article III that an action must implicate a substantial federal interest for such jurisdiction to exist. *Osborn v. Bank of the United States*, 22 U.S. 738 (1824). As Justice Frankfurter has written, "[i]f there is in the phrase 'arising under the laws of the United States' leeway for expansion of our concepts of jurisdiction, the history of Article 3 suggests that the area is not great and that it will require the presence of some substantial federal interest, one of greater weight and dignity than questionable doubt concerning the effectiveness of state procedure." *Textile Workers Union v. Lincoln Mills,* 353 U.S. 488, 483-84 (1957) (Frankfurter, J. dissenting).[3]

Even if the state court were unable to timely adjudicate the present action, there would nonetheless be no federal interest sufficient to support jurisdiction given the remote connection between this action and the pending Phar-Mor bankruptcy. The adjectives "hypothetical," "indirect,"

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[3]Though included in a dissenting opinion on an issue not reached by the majority, Justice Frankfurter's discussion of federal jurisdiction provides a particularly illuminating explanation of the limits of Article III federal question jurisdiction.

and "contingent" pose far more than a semantical dispute, as Coopers suggests (Brief in Opposition at 20-21) — they quite clearly describe why there is no substantial federal interest in this action. FoxMeyer's case against Coopers will have no direct effect on the Phar-Mor bankruptcy. A judgment in favor of Coopers would have no impact whatsoever, and a judgment in favor of FoxMeyer would not necessarily affect the bankruptcy. Phar-Mor is not a party to the action, nor is the status of any property of the estate being adjudicated here. The judgment ultimately entered in this action will have absolutely no direct impact on the Phar-Mor bankruptcy.

Coopers attempts to obscure this issue by reciting FoxMeyer's activities in the Phar-Mor bankruptcy and by confusing FoxMeyer's claims against Coopers in this action with Phar-Mor's separate claims against Coopers (Brief in Opposition at 2-5), along with vague predictions that timely state proceedings will somehow "frustrate" resolution of the Phar-Mor bankruptcy (Brief in Opposition at 29 n. 12). But ultimately Coopers can locate only one possible indirect impact a judgment in this action could have on the Phar-Mor bankruptcy: the possibility that a judgment in favor of FoxMeyer may satisfy FoxMeyer's bankruptcy claim against Phar-Mor. (Brief in Opposition at 18) For this indirect impact to occur, however, several contingencies must first occur (see Petition at 6). Although it is certainly conceivable that these contingencies might occur, not just any "conceivable" federal interest will suffice. Federal jurisdiction requires more than the "remote possibility" of a federal interest. *Lincoln Mills,* 353 U.S. at 482 (Frankfurter, J., dissenting).[4] For federal jurisdiction to exist a significant federal

[4]This constitutional restriction on federal jurisdiction is not altered by the fact that several circuits have adopted an "any conceivable effect"

interest must be *directly implicated* by the action. *Gully v. First Nat'l Bank,* 299 U.S. 109 (1936). In the present case there would be no direct effect.

Coopers concedes that any impact this action might have on the Phar-Mor bankruptcy is indeed subject to several contingencies, but argues that "sound jurisdictional doctrine" should not demand inquiry into the possibility of these contingencies arising (Brief in Opposition at 21). FoxMeyer agrees that the focus of the jurisdictional inquiry should not (and need not) be a detailed determination of the likelihood of these contingencies arising. But the solution is not, as Coopers suggests, to extend federal jurisdiction no matter how remote the federal interest.[5] Instead, mere hypothetical possibilities of effect should never suffice to satisfy the Article III, section 2 requirement of a substantial federal interest in an action. *Cf. Louisville & Nashville Railroad v. Mottley,* 211 U.S. 149 (1908). Only if the outcome of an action

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test for "related to" bankruptcy jurisdiction — a test apparently created by the authors of the Collier bankruptcy treatise without any consideration of constitutional limitations. Several lower courts, though acknowledging the any-conceivable-effect analysis, have limited "related to" jurisdiction to circumstances where an action will directly impact a pending bankruptcy. *See, e.g., Pacor, Inc. v. Higgins,* 743 F.2d 984, 994-96 (3d Cir. 1984).

[5]Opening the jurisdictional inquiry to the type of remote effect suggested by Coopers would lead to an unthinkable expansion of federal judicial authority. For example, Coopers suggests that returning this action to state court (where it properly belongs) would distract Phar-Mor officials called to testify in the state-court action and thereby affect the pending bankruptcy. (Brief in Opposition at 28) Were this so-called "federal interest" sufficient to support federal jurisdiction, however, every state court action where an official of a bankrupt party might be a mere witness could be removed as "related to" a pending bankruptcy. Under no legitimate constitutional philosophy can Article III, section 2 federal question jurisdiction extend this far.

would directly (and thus necessarily) impact a pending bankruptcy can the action "relate to" the bankruptcy within the meaning of 28 U.S.C. § 1334(b) as limited by Article III, section 2 of the Constitution.

Coopers also asserts that the Article III, section 2 jurisdictional inquiry is not ripe because "neither of the Courts below has addressed the constitutional arguments now put forward." (Brief in Opposition at 15) This assertion is incorrect for two reasons. First, as Coopers recognizes, where jurisdiction is questioned courts have "the power and the duty, subject to review to determine the jurisdictional issue." *See* Brief in Opposition at 10 (citing 13A Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 3536 at 535 (2d ed. 1984)). Second, the lower courts have necessarily addressed the jurisdictional question, because in the Third Circuit "related to" bankruptcy jurisdiction has been treated as extending to the limits imposed by Article III, section 2. *See Pacor, Inc. v. Higgins,* 743 F.2d 984, 994 (3d Cir. 1984). These constitutional limits were thus considered when the lower courts decided whether this case "related to" the Phar-Mor bankruptcy within the meaning of 28 U.S.C. § 1334(b).

For the foregoing reasons, and for the reasons set forth in FoxMeyer's petition, the relief requested in the petition should be granted.

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